

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

APRIL TERM, 1925.

No. 4315.

222

**FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
APPELLANT,**

vs.

FRANK SHEPHERD.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED MARCH 31, 1925.

PRINTED MAY 18, 1925.

Court of Appeals of the District of Columbia.

APRIL TERM, 1925.

No. 4315.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
APPELLANT,

vs.

FRANK SHEPHERD, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 4315.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant,

vs.

FRANK SHEPHERD.

a Supreme Court of the District of Columbia.

At Law. No. 66377.

FRANK SHEPHERD, Plaintiff,

vs.

UNITED PHONOGRAPH STORES, INCORPORATED, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Declaration.

Filed February 21, 1922.

In the Supreme Court of the District of Columbia.

At Law. No. 66377.

FRANK SHEPHERD, Plaintiff,

vs.

UNITED PHONOGRAPH STORES, INCORPORATED, Defendant.

The plaintiff Frank Shepherd, sues the defendant, United Phonograph Stores Incorporated, a corporation organized and existing under the laws of the State of Delaware and maintaining a store at 1312 G Street, N. W., in the city of Washington, District of

Columbia, and doing business therein, for that heretofore to wit, on the 1st day of November, 1921, the defendant promised and agreed that if plaintiff would pay into or cause the sum of Five Thousand (\$5,000.00) Dollars to be paid into the business of the defendant, the defendant would open up a branch office in Los Angeles, California, and place the plaintiff as its agent in charge thereof, and to allow the plaintiff a drawing account of Three Hundred and Fifty Dollars per month for a period of Two months from November 15, 1921, and payable on the 1st and 15th of each month, chargeable against a stipulated commission of 15% on all sales of stock of the defendant corporation made by plaintiff, and the defendant further promised and agreed to pay the plaintiff's traveling expenses; that in accordance with this agreement, plaintiff on or about said date paid the sum of Twenty-five Hundred (\$2,500.00) Dollars to the defendant in cash and immediately thereafter cause a like sum to be paid to the defendant on his behalf, making the total of Five Thousand (\$5,000.00) Dollars agreed upon;

That notwithstanding this agreement and promise on the part of defendant, said defendant has utterly failed, neglected and refused and still refuses to open a branch office in Los Angeles or elsewhere in the State of California and to place the plaintiff as its agent in charge thereof, and has failed and refused and still refuses to pay the plaintiff \$350.00 per month, or any part thereof, due him on the drawing account, and has failed and refused and still refuses to pay a balance of One Hundred and Seventy-five (\$175.00) Dollars due the plaintiff on account of traveling expenses;

And the plaintiff says that by reason of the defendant's failure to carry out the terms of the aforesaid promise and agreement, he has been damaged in the sum of Forty-one Hundred (\$4,100.00) Dollars;

Therefore plaintiff brings this suit and claims damages in the sum of Forty-one Hundred (\$4,100.00) Dollars with interest from the 21st day of February, 1922, besides costs.

(2) The plaintiff Frank Shepherd, sues the defendant, United Phonograph Stores Incorporated, a corporation organized and existing under the laws of the State of Delaware, for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and material provided by the plaintiff for the defendant at its request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims \$4,100.00 with interest from the 21st day of February, 1922, according to the particulars of demand hereto annexed.

J. MORRILL CHAMBERLIN,
Attorney for Plaintiff.

Bill of Particulars.

*	*	*	*	*	*	*
November 1, 1921.	Cash advanced by plaintiff to de-					
	fendant					\$2,500.00
"	" 15% Commission on sale of \$2,500.00					
	stock					375.00
	Balance due on traveling expenses..					175.00
	Drawing account from November					
	15, 1921 at \$350.00 per month..					1,050.00
	Amount due					\$4,100.00

Affidavit of Merit and in Support of Attachment.

* * * * * * *

DISTRICT OF COLUMBIA, ss:

Frank Shepherd, being duly sworn, deposes and says that he is the plaintiff in the above suit in which the United Phonograph Stores Incorporated is the defendant and that he has a good cause of action against said defendant as follows:

4 That on or about the first day of November, 1921, he entered into a contract with the defendant whereby it was agreed and understood that if he would pay, or cause to be paid to the defendant the sum of \$5,000.00 the defendant would open a Branch Office in the State of California and there install the plaintiff as its agent in charge and to allow him a drawing account of \$350.00 per month chargeable against a commission of 15% on all sales of stock of the defendant Corporation made by him, and that defendant would pay the plaintiff's traveling expenses:

That the plaintiff on or about said first day of November, 1921, paid \$2,500.00 in cash to the defendant and caused a further sum of \$2,500.00 to be paid to the defendant in accordance with the terms of said promise and agreement:

That on the fifteenth day of November, 1921, plaintiff proceeded to Los Angeles, California, at the direction of the defendant and opened an office therein, which he was forced to close within a period of three weeks because the defendant failed to comply with the Corporate Securities Act of the State of California; that plaintiff thereupon returned to defendant's executive office in the City of New York, and explained the requirements of that Act and endeavored to get the defendant to comply with the terms of said Act: but notwithstanding his entreaties the defendant disregarded its promise and agreement to maintain an office in that State and has since that time continuously failed and refused so to do; that defendant also promised and agreed to pay plaintiff a commission of 15% on all sales of defendant's stock made by him;

that plaintiff made a sale of \$2,500.00 worth of said stock upon which he was entitled to receive a commission of \$375.00, which sum the defendant has made frequent promises to pay but has failed and refuses so to do although plaintiff has demanded the defendant to pay the same; that the defendant later requested the plaintiff to go to Philadelphia, Pennsylvania, and New York, N. Y. on its behalf, promising to pay his expenses in that connection; that the plaintiff thereby incurred an expense of \$175.00 which the defendant has also refused to pay although often requested so to do.

That the defendant is a foreign corporation organized and existing under the laws of the State of Delaware.

That the plaintiff has a just right to recover from the defendant the sum of \$4,100.00 with interest from the 21st day of February, 1922, exclusive of all set-offs and just grounds of defense.

FRANK SHEPHERD.

Subscribed and sworn to before me this 21st day of February, 1922.

[SEAL.]

EDITH H. HEISKELL,
Notary Public, D. C.

Memoranda.

February 21, 1922.—Appraised value of property—\$2,876.50.
Writ of Attachment—etc., issued and executed.

6 *Undertaking to Release Property Attached.*

Filed February 27, 1922.

* * * * *

The defendant, and Fidelity and Deposit Company of Maryland, surety, in consideration of the discharge from the custody of the Marshal of the property seized by him, upon the attachment sued out against the defendant, on the 21 day of February, A. D. nineteen hundred and twenty-two, in the above-entitled cause, appear, and submitting to the jurisdiction of the Court, hereby undertake, for themselves and each of them, their and each of their heirs, executors and administrators, successors or assigns, to abide by and perform the judgment of the Court in the premises in relation to said property, which judgment may be rendered against all the parties whose names are hereto subscribed.

Signed this 27 day of February, A. D. 1922.

UNITED PHONOGRAPH STORES, INC.,
By J. V. MORRIS, V. P., [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By F. S. KEY SMITH,
Atty. in fact. [SEAL.]

Approved this 27th day of February, 1922.

WENDELL P. STAFFORD.

Defendant's Plea.

Filed March 14, 1922.

* * * * *

For plea to the first Count of the declaration filed in the above entitled cause, the defendant says that it never undertook and promised, as plaintiff in said Count hath alleged.

7 For a plea to the second Count of said declaration, the plaintiff says that it is not indebted.

For a further plea to said declaration and each Count thereof, this defendant says that it never promised or agreed that if plaintiff would pay into or cause the sum of \$5,000.00 to be paid into the business of the defendant, that defendant would open up a branch office in Los Angeles, California, and place plaintiff as its agent in charge thereof; or that it agreed to allow plaintiff a drawing account of \$350.00 a month for a period of two months from November 15, 1921, to be chargeable against a stipulated commission of 15 per cent on sales of its stock, or that it promised and agreed to pay plaintiff's traveling expenses.

W. A. JOHNSTON,
Attorney for Defendant.

Affidavit of Harry W. Yeager.

* * * * *

STATE OF NEW YORK,

County of Westchester, ss:

Harry W. Yeager, being first duly sworn on oath deposes and says that he is the President of the United Phonograph Stores, Incorporated, the corporation named in the foregoing annexed pleas; he denies that the defendant entered into any agreement whatever with the plaintiff whereby it was agreed and understood that if the plaintiff would pay, or cause to be paid to the defendant the sum of \$5,000.00, that the defendant would open up a branch office in the State of California and there install plaintiff as its agent in charge and allow him a drawing account of \$350.00 a month, chargeable against a commission of 15 per cent on all sales of stock of defendant corporation made by him, or that defendant would pay
8 plaintiff's traveling expenses. And defendant denies that the plaintiff on the 1st of November, 1921, paid the sum of \$2,500.00 in cash to the defendant and caused the further sum of \$2,500.00 to be paid to the defendant in accordance with the terms of any promise or agreement that defendant would open up a branch office in California and install plaintiff as its agent and allow him a drawing account and commission on sales. Defendant denies

that the plaintiff did proceed to Los Angeles, California, at the direction of the defendant and open an office therein. Defendant denies that it had any agreement whatever with the plaintiff to allow him a commission on sales of defendant's stock made by him. Defendant says that it received an order from Nat Cordish, incorporated, for \$2,500.00 worth of its stock to be issued by the defendant to the plaintiff, and said stock was accordingly issued in the name of plaintiff and delivered to Nat Cordish, Incorporated, and said stock is still outstanding in the name of said plaintiff. Defendant denies that the plaintiff made a sale of \$2,500.00 worth of its stock, upon which he is entitled to receive a commission of \$375.00 from this defendant, and defendant denies that it ever received any order of sale for stock from said plaintiff, but that all sales of its stock were made by it through Nat Cordish, Incorporated, fiscal agent of this defendant, and that if said plaintiff made any sale of said stock amounting to \$2,500.00 and is entitled to any commission therefor, it was through some arrangement of plaintiff with said Nat Cordish, Incorporated, fiscal agent of this defendant; and if plaintiff is entitled to any commission therefor said commission is due and owing to him by said Nat Cordish, Incorporated, and not by this defendant.

9 This defendant further says that it never entered into any agreement with the said plaintiff to employ him as its agent in the sale of its stock; that all of its arrangements for the sale of its stock have been through its fiscal agents; that it has endeavored to help plaintiff in relation to some connection plaintiff had established with its fiscal agent Nat Cordish, Incorporated, in the sale of defendant's stock, but that at no time has it entered into or had any agreement whatever with the plaintiff respecting its business or the sale of its stock by plaintiff. It has always when called on been ready to give and given whatever assistance it could to plaintiff in plaintiff's association and connection with defendant's fiscal agents in the sale of defendant's stock. Defendant denies that it ever entered into any agreement whatever with the plaintiff in relation to opening an office in Los Angeles, California, or elsewhere, or that it ever agreed or entered into any agreement with the plaintiff looking to the making of the plaintiff its agent in Los Angeles, California, or elsewhere, or that it ever agreed to give the plaintiff a drawing account or allow him any sum of money whatever on account of commissions, or that it ever had any relations whatever with the plaintiff in regard to the sale of its stock by plaintiff, or that it ever agreed to pay plaintiff's traveling expenses or any expenses whatever of plaintiff.

HARRY W. YEAGER.

Subscribed and sworn to before me this 13th day of March, 1922.

[SEAL.]

HARVEY I. ETTINGER,

Notary Public, County of Westchester, State of New York.

Term expires March, 1923.

10

Motion to Stay Cause.

Filed October 18, 1922.

* * * * *

Now comes the defendant in the above entitled cause, and by its counsel moves the Court to stay said cause as authorized by the bankruptcy laws of the United States on the ground that on the 15 day of May, 1922, in a certain ancillary proceeding in the Supreme Court of the District of Columbia, Bankruptcy No. 1307, entitled "In the matter of United Phonograph Stores, Inc." a receiver was appointed to take charge of the entire assets of the defendant corporation, and Julien Hartridge has been appointed trustee for the United Phonograph Stores, Inc., which had been adjudicated a bankrupt, and that this action is founded upon a claim which a discharge in bankruptcy would be a release.

WALTER A. JOHNSTON,
Attorney for Defendant.

DISTRICT OF COLUMBIA, ss:

Walter A. Johnston, being first duly sworn on oath, deposes and says that he has read the foregoing motion, and that the facts stated therein to be true are true.

WALTER A. JOHNSTON.

Subscribed and sworn to before me this 18 day of October, 1922.

MORGAN H. BEACH,
Clerk.

ALF G. BUHRMAN,
Asst. Clerk.

Mr. J. Morrill Chamberlin,
Attorney for Plaintiff:

Please take notice that the foregoing motion will be called to the attention of the Court on Friday, next the 20th day of October, 1922, or as soon thereafter as counsel can be heard.

11

W. A. JOHNSTON,
Attorney for Defendant.

Supreme Court of the District of Columbia.

Friday, October 27th, 1922.

Session resumed pursuant to adjournment Hon. A. A. Hoehling,
Justice presiding.

* * * * *

Upon motion of plaintiff by his attorney, it is ordered that Julien Hartridge, Trustee in bankruptcy for the United Phonograph Stores, Inc., be, and he is hereby substituted as party defendant herein.

Thursday, November 23rd, 1922.

Session resumed pursuant to adjournment. Hon. A. A. Hoehling, Justice presiding.

* * * * *

Pursuant to the motion of the trustee in bankruptcy for the defendant in this case and good cause shown, it is ordered that the order of the court made herein October 27th, 1922, substituting the trustee in bankruptcy as party defendant be, and the same is hereby set aside.

Memorandum of Court.

Filed June 4, 1923.

* * * * *

Declaration was filed herein, February 21, 1922, claiming damages against the defendant, for alleged breach of contract, in the sum of \$4,100, with interest from February 21, 1922. With the
12 declaration, there was filed the affidavit of plaintiff both on the merits and in support of attachment before judgment.

Writ of attachment issued, on the date of filing suit, *supra*, and under that writ divers goods and chattels of the defendant were attached, of the appraised value of \$2,876.50, the usual schedule being attached to the appraisal.

On March 1, 1922, the goods and chattels attached were delivered to the defendant; this under the provisions of law, and the following undertaking entered into by the defendant, with the Fidelity and Deposit Company of Maryland as surety, as follows:

"The defendant, and the Fidelity and Deposit Company of Maryland, surety, in consideration of the discharge from the custody of the Marshal of the property seized by him upon the writ of attachment sued out against the defendant, on the 21st day of February, A. D. 1922, in the above entitled cause, appear, and submitting the jurisdiction of the Court, hereby undertake, for themselves and each of them, their and each of their heirs, executors and administrators, successors or assigns, to abide by and perform the judgment of the Court in the premises in relation to said property, which judgment may be rendered against all the parties whose names are hereto subscribed."

Thereafter, March 14, 1922, the defendant filed pleas of the general issue, and supported the same by affidavit; and, on March 18, 1922, the plaintiff joined issue upon the pleas of defendant and noted the cause for trial at the then next term of the Court.

Thus the matter stood until October 18, 1922, when the defendant filed in the cause a motion to stay the same, as authorized by the Bankruptcy Laws of the United States, upon the stated ground that,

on May 15, 1922, in a certain ancillary proceeding in this Court, entitled "In the Matter of United Phonograph Stores, Inc.,"
13 Bankruptcy No. 1307, a receiver was appointed to take charge of the entire assets of the defendant corporation, and that one Julien Hartridge was appointed trustee for defendant, the latter having been adjudicated a bankrupt, and that the action herein is founded upon a claim which a discharge in bankruptcy would release.

On October 27, 1922, order was entered in the cause substituting the said Julien Hartridge, trustee in bankruptcy, as above, as party defendant; that action being taken upon the supposed consent of the trustee in bankruptcy that he be so substituted as party defendant. Later on, however, it appeared that the trustee in bankruptcy did not and would not so consent to appear in the cause, and, accordingly, on November 23, 1922, the certain order of substitution of October 27, 1922, *supra*, was vacated and set aside.

No further action has been taken in the case so far as immediately concerns the defendant corporation or its said trustee in bankruptcy, but the plaintiff, insisting upon his right to a trial of the cause, has encountered opposition from the Fidelity and Deposit Company, as surety on the undertaking aforesaid, the latter insisting that the motion to stay the cause should be granted, because of the bankruptcy of the defendant.

The theory of the plaintiff is that, because of the undertaking given in the cause, the surety is liable, in the event of judgment entered therein, to pay the judgment, and that the requirements of the bankruptcy law can be met, in the event of judgment rendered against the defendant, by a perpetual stay of execution so far as the bankrupt is concerned. Counsel for plaintiff has filed a

14 written memorandum of authorities upon the proposition, which are cited by him as affirming the right of plaintiff to proceed where the situation is one of the kind here involved.

The Court has carefully considered the matter and, while doubtless the authorities are not entirely in harmony concerning the proposition, nevertheless, under the circumstances of this case, it is of opinion that plaintiff should be permitted to proceed in the cause, and, if by verdict of the jury and judgment of the Court entered thereon, it shall appear that plaintiff is entitled to recover, such judgment would be properly entered against both the defendant and the Fidelity and Deposit Company of Maryland, as surety on the undertaking aforesaid, with the right on the part of plaintiff to enforce the same against the surety, such judgment, however, to be perpetually stayed as against the bankrupt defendant.

It results that the motion to stay should be and is *overruled*.

A. A. HOEHLING,

Justice.

Supreme Court of the District of Columbia.

Monday, June 4th, 1923.

Session resumed pursuant to adjournment, Hon. A. A. Hoehling,
Justice presiding.

* * * * *

Upon consideration of the motion of defendant filed herein by
its attorney October 18th 1922, to stay this cause under the bank-
ruptcy laws of the United States, it is ordered that said
15 motion be and the same is hereby overruled.

Memoranda.

June 18, 1924.—Verdict for plaintiff for \$3,750.00 with interest
from February 21, 1922.

June 23, 1924.—Motion for new trial filed and entered.

Supreme Court of the District of Columbia.

Monday, December 8th, 1924.

Session resumed pursuant to adjournment, Mr. Justice Bailey
presiding.

* * * * *

The motion for a new trial filed in this cause having heretofore
been argued and submitted, it is ordered that said motion be, and
the same is hereby overruled, and judgment on verdict is ordered.

Wherefore, it is considered that plaintiff recover herein of defend-
ant and Fidelity and Deposit Company of Maryland, its surety, the
sum of Three thousand seven hundred and fifty dollars, (\$3,750.00)
with interest thereon from February 21st, 1922, together with the
costs of suit, to be taxed by the Clerk, and have execution thereof.

16 Supreme Court of the District of Columbia.

Saturday, December 13th, 1924.

Session resumed pursuant to adjournment, Mr. Justice Bailey
presiding.

* * * * *

Upon consideration of the motion of The Fidelity and Deposit
Company of Maryland filed herein December 10th, 1924, it is ordered
this 13th day of December, 1924, that the judgment heretofore
entered in this cause on December 8th, 1924, be, and the same is
hereby vacated, and that in lieu thereof judgment be entered for
the plaintiff against the defendant and said Fidelity and Deposit

Company of Maryland for the sum of Three thousand seven hundred and fifty dollars (\$3,750.00) with interest from February 21, 1922, and costs, that execution on said judgment against the defendant United Phonograph Stores, Incorporated, be, and the same is hereby perpetually stayed; that execution shall be had against said Fidelity and Deposit Company of Maryland and may be issued, but this judgment to be released and held for naught as to said Fidelity and Deposit Company of Maryland upon the delivery by it or, by the defendant to the U. S. Marshal of this District of the property levied upon, if said delivery be made within ten (10) days from the date of entry of this judgment, or, in lieu of such delivery, the payment by said Fidelity and Deposit Company of Maryland to the plaintiff of the sum of Two thousand eight hundred seventy-six and 50/100 dollars (\$2,876.50), the appraised value of the property attached herein, with interest from date hereof.

From this judgment in open Court, the Fidelity and Deposit Company of Maryland by its Attorney notes an exception, and also prays an appeal to the Court of Appeals of the District of Columbia, and the maximum penalty of an undertaking on said appeal to operate as a Supersedeas is hereby fixed in the sum Three thousand five hundred dollars (\$3,500.00).

Memoranda.

January 7, 1925.—Supersedeas Undertaking on Appeal—\$3,500.00 approved and filed.

Time to file and submit Bill of Exceptions extended from day to day to and including February 10, 1925.

February 7, 1925.—Bill of Exceptions (proposed)—filed.

Assignment of Errors.

Filed February 7, 1925.

* * * * *

Now comes the defendant, Fidelity & Deposit Company of Maryland, and assigns as error the ruling of the trial court in the admission and exclusion of evidence and in other matters during the course of the trial, as follows:

1. The Court erred in admitting in evidence the questionnaire which plaintiff testified he had filed out at request of Morris, Vice President of defendant Company.

2. The Court erred in admitting in evidence letters passing between plaintiff and Nat Cordish, Incorporated and Nat Cordish.

3. The Court erred in admitting in evidence certificate of stock issued by defendant to plaintiff.

4. The Court erred in admitting in evidence check for \$2,500.00 endorsed by plaintiff to Nat Cordish, Inc.

5. The Court erred in admitting in evidence testimony of plaintiff regarding agreement between plaintiff and Yeager, Morris

and Cordish, that the latter would contribute to the capital of a California Company to be formed as well as any testimony relating to the formation of a California Company.

6. The Court erred in excluding from evidence testimony offered by the defendant surety to show the adjudication in bankruptcy of the United Phonograph Stores, within four months of the levying of the attachment of plaintiff of its property and the sale of the attached property by the Supreme Court of the District of Columbia in said bankruptcy proceedings.

7. The Court erred in refusing to stay the cause because of the bankruptcy of the United Phonograph Stores.

8. In overruling the motion of defendant surety to direct a verdict in favor of defendant and itself at the close of all the testimony.

9. The Court erred in refusing to grant the prayer offered by defendant.

W. A. JOHNSTON,
HAMILTON & HAMILTON,
Attorneys for Fidelity & Deposit Company of Maryland.

Designation of Record.

Filed February 7, 1925.

* * * * *

The Clerk in preparing the Transcript of Record in this cause will embody therein the following, to wit:

19 1. Declaration, Bill of Particulars and Affidavit of Merit filed February 21, 1922.

2. Undertaking releasing property attached with Fidelity and Deposit Company of Maryland surety, approved and filed February 27, 1922.

3. Pleas of defendant and affidavit of defense filed March 14, 1922.

4. Memorandum showing appraised value of property attached, and date of attachment.

5. Motion to stay cause because of bankruptcy of defendant, filed October 18, 1922.

6. Order substituting Julien Hartridge, Trustee in Bankruptcy of defendant, as a party defendant, filed October 27, 1922.

7. Order vacating order of substitution of October 27, 1922, filed November 23, 1922.

8. Order overruling motion to stay cause because of bankruptcy of defendant, filed June 4, 1923.

9. Memorandum of Court (Hoehling, J.) filed June 4, 1923.

10. Memorandum of trial and verdict of jury June 18, 1924.

11. Memorandum of filing of motion for new trial, filed June 23, 1924.

12. Memorandum of order overruling motion for new trial and entering of judgment against defendant and Fidelity and Deposit Company of Maryland, filed December 8, 1924.

13. Order vacating judgment of December 8, 1924, and entering judgment against Fidelity and Deposit Company of Maryland, etc., notation of appeal in open court and amount of undertaking on appeal, filed December 13, 1924.

14. Memorandum of approval and filing of appeal undertaking, filed January 7, 1925.

15. Memorandum of orders extending time for filing Bill of Exceptions.

16. Memorandum of filing of Bill of Exceptions.

17. Memorandum of approval of Bill of Exception.

20 18. Assignment of Errors.

19. This Designation.

W. A. JOHNSTON,

HAMILTON & HAMILTON,

Attorneys for Fidelity & Deposit Company of Maryland.

Copy received Feb. 7/25.

J. MORRILL CHAMBERLIN.

Supreme Court of the District of Columbia.

Friday, February 27th, 1925.

Session resumed pursuant to adjournment, Mr. Justice Bailey presiding.

* * * * *

The Court having signed the Bill of Exceptions submitted herein February 7th, 1925, as of the time of the noting thereof at the trial, now hereby orders the same made of record, nunc pro tunc.

21 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 66377 at Law, wherein Frank Shepherd is Plaintiff and United Phonograph Stores, Incorporated, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 30th day of March, 1925.

[Seal of Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

EW.

22 In the Supreme Court of the District of Columbia.

At Law. No. 66,377.

FRANK SHEPHERD, Plaintiff,

vs.

UNITED PHONOGRAPH STORES, INC., Defendant.

Messrs. Chamberlin & Smith and Godfrey L. Munter,
Attorneys for plaintiff.

Please take notice that the bill of exceptions of the Fidelity & Deposit Company of Maryland in the above entitled cause, copy of which is hereto attached, will be submitted to Mr. Justice Siddons in Criminal Court No. 1 for settlement and signature on March 10th, 1925, at ten o'clock A. M., or as soon thereafter as counsel can be heard.

W. A. JOHNSTON.
HAMILTON & HAMILTON.

Service of copy of Bill of Exceptions acknowledged this 7th day of February, 1925.

J. MORRILL CHAMBERLIN.

23 In the Supreme Court of the District of Columbia.

At Law. No. 66,377.

FRANK SHEPHERD, Plaintiff,

vs.

UNITED PHONOGRAPH STORES, INC., Defendant.

Bill of Exceptions.

Be it remembered that this cause came on for hearing before Mr. Justice Siddons and a jury on June 16th, 1924.

Whereupon the plaintiff, to maintain the issues on his part joined, was produced as a witness in his own behalf and testified as follows:

That he was the plaintiff in the case and his connection with the defendant was under a written letter of contract. That he was first introduced by Col. Huston to Mr. John Morris, Vice President of the defendant, on October 28, 1921, in the defendant's office in the Union Trust Building, Washington, D. C. Mr. Morris asked him to fill out a form questionnaire, which he handed him, and returned it to him later in the day.

Whereupon counsel for the plaintiff stated that notice to produce said question-aire had been served upon the defendant. De-

fendant's counsel responded that he did not have nor had he ever seen said question-aire.

Whereupon counsel for the plaintiff tendered to the witness a blank form for purposes of identification.

24 The witness thereupon stated that it was an identical copy of the form that he completed at Mr. Morris' request and that when he filled it out he handed it to Mr. Morris on the afternoon of the first day mentioned, and that he distinctly remembered what he put in the form as completed.

Whereupon the witness testified as follows:

"A (Reading) '1. Name of City or town' to which I—this is my recollection—to which I answered 'Washington, D. C.'

'2. County. 3. State. 4. Town population. 5. County population,' All of which I answered 'District of Columbia.'

'Number smaller towns in 20 mile radius.' Well, I probably put those down, I do not remember.

Mr. Brady. I object to what the witness probably did.

By Mr. Chamberlin:

Q. As I understand, Mr. Shepherd, the question which you have just testified to you were asked in the question-aire to give a number of towns near and within a certain radius of Washington, and the population? A. That is so.

Q. Did you answer that to the best of your ability? A. I did.

Mr. Johnston: I object to whether he did it to the best of his ability.

The Court: He just asked if he did.

By Mr. Chamberlin:

Q. Take the rest of the questions. A. (Reading) 'Is the retail business of your town dependent upon manufacturing, mining, agriculture, shipping, summer or winter resort—which?'

Q. Do you remember what reply you made to that? A. I said, 'No'. 'Name of your most important industry,' which I answered, 'The Governmental, executive.'

Mr. Johnston: What is that?

The Witness: The Government business of this town. There are no large mining and so forth.

The Court: He said the government, executive.

The Witness: 'Name of second industry.' Well, I did not put any answer to that question.

'Third'—the same thing, regarding Washington as not a manufacturing place.

'Have you a commercial club, board of trade, chamber of commerce, auto club, orchestra or band? Give names of officers and which is the most prominent.' I mentioned the chamber of commerce only, not being familiar with the rest of those things.

'Financial data and so forth.' I could not give those figures, because I am not familiar with the capitalizations of the different banks or anything else.

25 The Court: You need not give your reasons. Just say what you gave and what you did not?

The Witness: All right. 'What chain stores are selling (a) Groceries?' I mentioned the store.

Mr. Brady: What store?

The Witness: Liggett's. The first is groceries, and I mentioned the A. & P. (Atlantic & Pacific), and I am looking at the next question, drugs, and I mentioned Liggett's stores. 'Cigars? Shoes? Clothing?' I gave an answer to each one.

Mr. Brady: What was the answer?

The Witness: I cannot answer that question.

'What percentage of total business in Musical Supplies do you think was purchased direct from Mail Order Houses in your town?' 'What percentage of such business was done with firms in nearby towns?'

The Witness: 'Do you believe that a musical supply store, selling quality goods, because of co-operative buying and quick turnover, as part of a chain system, will be successful in your town? What has been the attitude of the people towards such stores?' My answer was 'yes.'

The Witness: 'Estimate what you believe would be the first year's gross business of a United Phonograph Stores Agency if established in your town?' To which I could not give an answer.

'Or what would be the yearly rental of a suitable store on your main street?' I could not give an answer.

'Estimate cost of (a) heat.' I could not do it.

'Light.' The same.

'Incidentals.' The same.

'I have answered the above questions to the best of my knowledge and belief, without any obligation on my part, for the mutual benefit of all concerned.' Then I signed my name and my address.

On the next page 'Personal History Data. 1. Desire agency in?' And I completed 'Los Angeles' on that line.

'How long have you lived there?' 'Three years' was my answer.

'Name in full,' would be 'Frank Shepherd', 'Address' 'Fontanet Courts.'

'Age' would be '29'.

'Height' 5 feet ten inches.

'Weight' 140 pounds.

'Nationality' Naturalized.

'Married or single'—Married.

'Family' Three.

'Religion' Protestant.

'Give the several firms you have worked for, or business you have been interested in as all or part owner from time to time for the past ten years.'

A. I was first employed by the Westinghouse Electric and Manufacturing Company from June 1st, 1914, until the same date in

1916, and then was secretary to Alexander G. McKenna, capitalist and metallurgist, Washington Steel & Ordnance Company, until the 1st day of April, 1919; as salesman of the Latrobe Tool Company, Latrobe, Pennsylvania, from April, 1919, until July, and then traveled to Los Angeles, California, as their Pacific Coast distributor. On July 10, 1921, I resigned that connection.

26 A. From California I returned to Washington and from Washington I went to Europe, I returned here and became acquainted with United Phonograph Stores, Incorporated.

A. 'Are you now employed or engaged in business.' I said, No. 'What kind?' Of course the answer was no.

'Could you began work at once with a musical supplies agency?' To which I answered yes.

'How much capital can you invest or control for the purpose of joining the United Phonograph Stores, Inc., chain system, as local agent?' My answer was \$5,000 or more.

'What experience have you had in the musical supply business if any, or similar lines?' None.

'What have you averaged as monthly earnings from salary or profits?' I cannot give the specific figure that I gave at that time.

'Have you any income from property or investment?' I said yes.

'How much?' And I cannot give the figure that I gave at that time.

'Would you expect to devote all or part time to a musical supply agency?' My answer was yes.

'What is your education, school, high school, technical, college?' To which I answered Glusburn Technical Institute, England.

'Name of any clubs or other organizations to which you belong?' None.

'Name of any clubs or other organizations to which you belong?' None.

'Name of previous employers, location, business, period of employed, and salary.' H. M. Southgate, Westinghouse Electric & Manufacturing Company. In the Hibbs Building, Washington, D. C.

Q. Are these all references? A. Yes, sir. A. G. McKenna, at that time residing at Claremont, California; Latrobe Tool Company; Latrobe, Pennsylvania; the Vanadium Alloys Steel Company, Latrobe, Pennsylvania.

'Give the names and addresses of any other personal references you wish to add.' C. V. Wheeler, 1609, 16th Street, Washington, D. C.

'Add any information that will be of value to us in deciding your fitness to represent us in the locality in which you are known. The more you can inform us of your experience, capabilities, etc., the quicker we can decide.'

'Instructions: Answer in ink in your writing. Each question is important and must be answered as fully as possible. Capital without ability is useless. Cooperation of thought is as important as cooperation of capital.'

'I, the undersigned, do hereby affirm that each and every statement made by me in this Question-aire is absolutely true and correct to the best of my knowledge and belief.

27 'Dated at Washington, D. C., the 28th day of October, 1921.'

My own signature and address."

Whereupon said paper was offered in evidence and objected to by the defendant on the ground that the witness stated in many instances that he did not know what his answers were, and in others that he probably answered questions in a certain way and that there was, therefore, a failure to reproduce the original paper in substance. And the defendant accordingly moved that all of the foregoing testimony be stricken out, but the Court overruled said objection and motion, to which action in overruling said objection and motion, the defendant then and there requested the court to note an exception, which exception was noted by the court upon its minutes. Mr. Morris stated that he would like to get in touch with the references given by me and the next day told me that he had seen my references and that they were satisfactory. At six o'clock in the evening the following day, Mr. Morris asked me to come to the Union Trust Building to meet a Mr. Cordish who Mr. Morris said was with the United Phonograph Stores, but did not state in what capacity. At Mr. Cordish's request I went with him that night to New York to the offices of the defendant and was introduced to Mr. Yeager, its President. He said that they had not given thought of branching out so distant as California, but asked if I would make him a written memorandum, which I did, telling what I thought about Los Angeles and its vicinity; the people I knew there and how long I had lived there. Mr. Yeager and Mr. Cordish said they would like to talk it over and for me to call the following day, which I did. Mr. Yeager said he thought
28 very favorably of my application, of the prospects, of the territory I had mentioned, and that they would give me the position for which I had made application. At the request of Mr. Cordish and Mr. Yeager, I returned to Washington for further instructions from Mr. Morris who was vice-president of the company in charge of their Washington office and endeavoring to promote the expansion of their business in Washington through the sale of stock. Mr. Morris asked me to accompany their Mr. Welling who was one of the men selling these units of stock and I went out with Mr. Welling to interview some prospects. I later received the contract from Mr. Cordish that I demanded before proceeding to California. It is a letter dated November 14th.

Whereupon during an argument over the admissibility of a certain letter dated November 1st, the following occurred between the court and counsel for plaintiff;

"Mr. Chamberlin: The letter of November 14th is signed by—
The Court: I understand, but does that outline the agreement?
Mr. Chamberlin: Yes, sir; in paragraphs."

Whereupon the following letter was offered in evidence, plaintiff testifying that he had received it;

"United Phonograph Stores, Inc.,
Executive Offices, Third Floor,
110 West 34th Street, New York City.

November 1, 1921.

Mr. Frank Shepherd,
Fontanet Courts,
Washington, D. C.

DEAR MR. SHEPHERD:

It is with pleasure that I learn this morning that you are to become associated with the United Phonograph Stores, Inc., in an active way.

While it has not been the intention of our Board to open stores on the Pacific Coast, owing to the fact that there was so much good territory closer by, yet we feel, after talking with you, that there is a great opportunity for stores of our class and chain there. Your statements of the possibilities coupled with your sincere desire to see our chain developed in that territory has made an impression upon us. True it is some of the Board are not familiar with your statements as yet. Should the Board desire to carry out the plan as suggested by you, it will be because of our confidence in you and your judgment.

I take this early opportunity to congratulate you upon your business acumen in visualizing the great possibilities of our business and plan.

I am, with kind personal regards

Yours very truly,

(Sgd.)

H. W. YEAGER,
President, United Phonograph Stores, Inc."

HWY:MS.

Whereupon the following letter, over the objection of the defendant, on the ground that the connection of the writer with defendant had not been shown was offered and admitted in evidence to the admission of which letter defendant then and there requested the court to note an exception which was duly entered upon the minutes of the court;

"Nat Cordish, Incorporated,
110 West 134th Street,
New York City.

November 5, 1921.

Mr. Frank Shepherd,
United Phonograph Stores, Inc.,
#815 Union Trust Building,
Washington, D. C.

MY DEAR SHEPHERD:

I was indeed glad to hear that the United Phonograph Stores, Inc. received check for \$2,500.00 from you this morning on your subscription to Mary M. McKenna, as promised in your telegram several days ago.

At a meeting of the Executives of the United Phonograph Stores, Inc., everything went through smoothly and you will get a letter from the Company verifying the acceptance of the proposition as presented to them.

I will try to be in Washington on Thursday or Friday of next week. We can then take up the matter in detail as to when it would be best for you to leave.

I suggest, in the meantime, that you carry out the plan as laid out here, going out in Washington as Salesman under Mr. Morris's supervision.

With Kindest regards, I am
Very sincerely yours,
(Sgd.)

NAT CORDISH,
President, Nat Cordish, Inc."

30 Whereupon the following letter was offered and admitted in evidence;

"United Phonograph Stores, Inc.,
Executive Offices, 3rd Floor,
110 West 34th Street, New York City.

November 5th, 1921.

Mr. Frank Shepherd,
United Phonograph Stores, Inc.,
#815 Union Trust Building,
Washington, D. C.

DEAR MR. SHEPHERD:

We are sending you herewith via registered mail Certificate No. C-135 issued to you for one hundred shares of Common stock in the United Phonograph Stores, Inc., payment of which was recently acknowledged to you.

This certificate was held at this office pending receipt of instructions from you as to where you wished us to mail it so that it would reach you without delay.

Thanking you for your interest, we are

Yours very truly,

(Sgd.) UNITED PHONOGRAPH STORES, INC.,
H. I. ETTINGER,
Ass't Treasurer.

Whereupon counsel for plaintiff offered in evidence what purported to be the certificate of stock for one hundred shares of the defendant referred to in the last mentioned letter, to the admission of which, counsel for defendant duly objected on the ground that plaintiff in his declaration claimed the sum of twenty-five hundred (\$2,500.) dollars, cash advanced, and not the value of any stock. But the court overruled said objection and admitted said certificate in evidence, to which ruling defendant requested the court to note an exception, which exception was duly entered upon the minutes of the court.

31 Whereupon after identification, counsel for plaintiff offered in evidence a cashier's check of the Citizens National Bank of Latrobe, Pennsylvania, for \$2,500. to the order of plaintiff and by him endorsed to Nat Cordish, plaintiff testifying that this was the \$2,500, which he claimed to have paid the defendant, to which offer defendant objected but said objection was overruled, to which ruling defendant requested the court to note an exception, which exception was duly entered upon the minutes of the court.

Whereupon plaintiff offered in evidence a letter from the plaintiff to Nat Cordish dated November 11, 1921, and said letter was admitted in evidence over the objection of the defendant.

It was thereupon agreed between court and counsel that defendant should be understood as making the same objection and have the same exception as to the admission of all correspondence passing between Nat Cordish, Incorporated, or Mr. Cordish, and the plaintiff, on the ground that he was not an officer of, or had he any connection with, the United Phonograph Stores.

United Phonograph Stores, Inc.

Executive Offices: Third Floor 110 West 34th Street, New York City.

Washington Office: 815 Union Trust Bldg.

Telephone Main 6865—6866.

November 11, 1921.

DEAR MR. CORDISH:

Referring to our conversation of yesterday, I understand you will advise me by return mail in regard to the following:

(1) The basis on which commissions will be paid on the sale of stock in California. I suggest you advise the minimum and

maximum individual subscription you will accept for common stock only.

(2) It is my understanding that the N. Y. office will assume the expense of the Los Angeles office, including travelling expense, until such time as the California Company is in shape to take it over.

(3) Before leaving for California I should have authority to cover the following:

32 Open Bank account,
 Lease office, if necessary.

Equip office, if necessary.

Pay commissions from Los Angeles office, and any further authority you should care to give.

(4) I should have an idea of the minimum and maximum rent of locations for stores and authority to sign leases. Also to arrange for store fittings if necessary.

(5) Presumably, for the time being, all stock certificates will be issued in N. Y.

(6) I would like cuts or dies of trademark, particularly the latter for business cards.

(7) You promised to let me have rough copy of Master Report to read on train.

(8) Also to send painting of store interior and additional photographs of stores in operation and under construction.

(9) Kindly also furnish a list of towns in which stores are already located, if more than one in a town—how many—and the names of the towns in which stores are to be located within the next few weeks.

(10) A supply of forms giving new figures on conservative estimates—also include some of the old forms.

(11) Send direct to Los Angeles a good supply of all literature, forms etc., pertaining to everything.

(12) You were to send me a letter to the effect you were holding stock certificate in my favor for 50 shares common stock—representing bonus on subscription for 100 shares. I presume you will duplicate this on subsequent personal subscriptions?

(13) I will personally attend to subscribing for certain stock in the name of Harry W. Finney, but request your patience for the time being.

(14) I advised you that two (2) Railroad tickets and Pullman accommodations to Los Angeles amounted to \$325.98, and would suggest you make an immediate advance of \$1,000.00. Expense will be accounted for weekly, or as you may suggest. You should stipulate the different expense which will be allowed, and I urge that you be as liberal as possible for the first two months. Kindly let me have your check early.

(15) We also agreed on a drawing account and I suggest this should date from Nov. 15, 1921.

(16) Kindly let me have my over payment of \$250.00 on subscription. I can use this right now.

(17) My address, until further notice will be 727 Story Building, Los Angeles, California, and all mail, Packages, telegrams, etc.,

should be addressed to Frank Shepherd, (personally) until such time as I have an office in the Company's name. Kindly also see that my surname is spelled correctly (Shepherd).

33 (18) Will furnish you with information as to how I can be reached enroute to California just as soon as accommodations have been obtained, giving Pullman Car number and space.

Will write you regarding any further questions that may come up.

Please remember you were to send your reply to these questions by special delivery to reach me in Washington on Sunday. Your letter should be addressed to Frank Shepherd, Fontanet Courts, Washington, D. C., Apartment #201. Any subsequent correspondence before leaving Washington on Tuesday next should be forwarded to 815 Union Trust Bldg.

Yours truly,
(S.)

FRANK SHEPHERD.

Kindly have your stenographer make me a copy of this letter."

Plaintiff thereupon offered in evidence letter dated November 14, 1921 from Nat Cordish, Incorporated, to plaintiff, reading as follows:

"Nat Cordish, Incorporated,
110 West 34th Street,
New York City.

November 14th, 1921.

Mr. Frank Shepherd,
Fontanet Courts,
Appartment #201,
Washington, D. C.

DEAR MR. SHEPHERD:

Answering your letter of November 11th, 1921, in which you enumerated a list of questions requested information governing your operations in California, I am pleased to give below complete answers: taking the liberty of numbering same to corresponde with your questions:

(1) You are to receive a total commission of fifteen (15%) per cent on the sale of all securities of the United Phonograph Stores, Inc., made by you. Commission will be payable to you weekly. This security is salable on the partial payment plan, as follows: Forty (40%) per cent payment at the time subscription is signed and the balance payable in not more than six (6) monthly installments. On cash subscriptions, commissions will be payable immediately. On partial payment subscription, commission in full will be payable when the forty (40%) per cent is received. When less than forty (40%) per cent initial payment is made, no
34 commission will be payable until subsequent payments have been made to total at least forty (40%) per cent. The

minimum number of shares of Common Stock to be sold is ten (10); the maximum number of shares of Common Stock to be sold is four Hundred (400). The present price per share of Common Stock is Twenty-Five (\$25.00) Dollars, and we reserve the right to make any and all changes in price of this stock. Our approval must be secured on any sale to be made in excess of 400 shares.

(2) The New York Office (Executive Offices) of the United Phonograph Stores, Inc., will assume the expense of the Los Angeles, California Office for a period of two (2) months. This expense will include all office expense, your travelling expense.

(3) You are authorized to open a personal banking account, in which you are to deposit the funds received by you on the sale of United Phonograph Stores, Inc. securities, prior to sending said funds to the Executive Offices in New York City.

You are authorized to lease an office, if necessary, from which to conduct the business pertaining to the sale of the United Phonograph Stores, Inc. securities. It is preferable that you sub-let a furnished office, suitable to your needs. You are to procure the services of a stenographer. In the event that it is necessary for you to lease an unfurnished office, you are authorized to procure furniture and fixtures necessary to suitably equip said office.

Until further notice, and until later agreed to by us, we deem it best to pay, at whatever rate advised by you, out of the total commission earned by you, (fifteen (15%) per cent), all commissions to any salesmen employed by you to sell securities of the United Phonograph Stores, Inc. Commissions to your salesmen will be payable on the same basis as your commissions, as outlined in Answer No. 1.

(4) We are unable to advise you the minimum and maximum rentals for stores of the United Phonograph Stores, Inc. on an average basis, but the figure is determined at about five (5%) per cent of the total gross business which we believe the store will do per year. We would suggest that should you encounter any good locations, that you send us complete information embodying location, size, surrounding business enterprizes, traffic regulations, neighboring musical stores, anticipated total business, etc. etc., and other information, facts, and data which will enable us to determine the advisability of procuring that site. Should you secure the opportunity of purchasing a modern, up-to-date musical store, send us this information, including the above facts. These matters will have

our very prompt attention, and you will be given authority to
35 make final arrangements. Fixtures, furniture, equipment and goods will be handled in a similar manner.

(5) All forms of receipts for monies received from your subscribers in full or on account will be acknowledged from the Executive Offices. All certificates of stock will be issued from the Executive Offices. This arrangement until your California Office is equipped to handle this work.

(6) Cuts and dies for advertising purposes and printing matter will be sent to your office.

(7) Copy of Master Report is being sent you in this mail, under separate cover, via Special Delivery.

(8) You will be furnished complete photograph sets of all stores now in operation and under construction; suitable for framing and salesmen's use.

(9) United Phonograph Stores, Inc. stores are now located in the following cities: Boston, Massachusetts; Middletown, Connecticut; Washington, District of Columbia; Plainfield, New Jersey; Perth Amboy, New Jersey; New Brunswick, New Jersey: Note: Middletown, Connecticut store fixtures already installed and stock of goods on order. Store will open very shortly, Washington, District of Columbia store fixtures will be installed the latter part of this month and will be immediately stocked with goods and opened.

Stores will soon be opened in the following cities: Hartford, Connecticut; Bayonne, New Jersey; three additional stores in Washington, District of Columbia; Scranton, Pennsylvania; Reading, Pennsylvania; Rosells Park, New Jersey; Jersey City, New Jersey.

Preparations are being made at this time for numerous other cities and you will be informed of the progress made.

(10) A supply of forms 'Conservative Estimates of Profits' old basis will be sent to you by mail. New Forms on present basis are being printed and will be sent you as soon as received.

(11) A complete and substantial supply of all literature, forms, photographs, write-ups, copies of advertisements and all other matter pertaining to the sale of securities of the United Phonograph Stores, Inc. will be sent to your California Office. This supply will be replenished on request from you and a supply of any new matter will be sent you as soon as prepared for distribution.

(12) A personal letter by Mr. Cordish will be sent you in reference to the matter covered by Question No. 12.

(13) This matter will be taken up with you thoroughly in a personal letter by Mr. Cordish, both letters to reach you Tuesday morning, November 15th, 1921.

(14) We enclose herewith Check No. C-1241 to your order 36 for \$326.00 in payment of Railroad tickets and Pullman accommodations for two (2). Also Check No. C-1242 to your order to cover expenses enroute, and Check No. 1243 to your order for \$350.00 to open a bank account in Los Angeles. (Check No. C-1242 is for \$150.00). The amounts of these checks are to be charged against your California Office account.

Expenses to be allowed you include the following—Office rent, Office equipment, stenographer salary, and other miscellaneous Office expense, including telephone, light, printing and advertising, stationery, and travelling expense.

You are to mail us an itemized list of your expenses on Saturday of each week, at the same time sending us a Night Letter giving the total amount of the expense on the report, so that check to cover same may be sent you on Tuesday of each week.

(15) As agreed, you are to receive a drawing account of \$350.00 per month for two (2) months, payable weekly, same to start from

November 15th, 1921. The total amount of this drawing account is chargeable against commissions to be earned by you.

(16) Check for \$250.00 representing your overpayment on your personal subscription was delivered to you in person by Mr. Cordish on November 11th, 1921, at Washington, D. C.

(17) We have made record of your California address at our Executive Offices and all mail matters will be forwarded in your name there. We have also corrected your name on our records.

(18) We shall be pleased to have you advise us how you can be reached enroute so that you may be kept advised of the immediate progress being made by the various selling offices of the United Phonograph Stores, Inc., the stores and the new openings at Middletown and Washington, D. C.

A copy of your letter first referred to above is enclosed herewith as requested.

Subscription blanks will be sent you from the Executive Office to use temporarily, until your own are printed. They are executed in duplicate, the original to be sent to the Executive Offices for permanent record, the duplicate to be given to customer. Please have your stenographer keep your record on cards until such time as your subscription blanks are printed in triplicate, so that you may retain a copy.

You are to send us a Daily Report, showing all business written for that day. A report is to be sent if no business is written, so that our records may be complete.

As stated in Answer No. 1, commissions will be payable to you weekly; check to leave our Office on Tuesday of each week and to include all business reported on your Daily Reports as received by us to Monday noon.

37 You are to send to the Executive Offices all monies received by you on securities of the United Phonograph Stores, Inc. during each week, on Saturday night of that week.

This letter was dictated by Mr. Cordish on Sunday, November 13th, 1921 and typed at my home. It therefore has not been read by Mr. Cordish and is signed by Mr. Cordish, per H. I. Ettinger.

Any corrections and additional will therefore be made on Monday, November 14th and sent to you in another letter by Mr. Cordish.

Wishing you every success and a pleasant trip, we are

Sincerely yours,

(S.)

NAT CORDISH, INC.,
NAT CORDISH,

President,

By H. I. ETTINGER."

Plaintiff thereupon offered in evidence letter from the plaintiff to Mr. Cordish, dated November 14, 1921, giving his routing on the proposed trip to California, and the points at which he could be reached by wire *on route*.

Thereupon he offered in evidence the following letter;

"United Phonograph Stores, Inc.,
Executive Offices, Third Floor,
110 West 34th St., New York City.

November 16, 1921.

Mr. Frank Shepherd,
727 Story Building,
Los Angeles, Calif.

MY DEAR MR. SHEPHERD:

I have returned to this office and received your letter of November 12th, and we will get something off to you the minute I get three or four of the executives together in order that we can qualify you for anything from elephants down.

I have always felt, since I first met you, that you would make a very fine representative because of the latent energy which I discovered you possess. I want to be kindly remembered to Mr. Finney, who also impressed me as a high type man.

I will keep in touch with you as to progress made and see that all the dope is forwarded to you as fast as it comes in. I appreciate that being so far away all this will be of material assistance to you in your efforts on the case.

I am, with kind personal regards to both you and Mr.
38 Finney.

Yours very truly,

UNITED PHONOGRAPH STORES, INC."
H. W. YEAGER,
President,

Whereupon plaintiff offered in evidence the following letter from plaintiff to Yeager, President of the United Phonograph Stores, being the letter referred to by Yeager in his letter of November 16th.

United Phonograph Stores, Inc.
Executive Offices: Third Floor, 110 West 34th Street, New York
City.

Washington Office: 815 Union Trust Bldg.
Telephone Main 6865—6866.

November 12, 1921.

DEAR MR. YEAGER:

Before I leave for the Coast on Tuesday, I think you should authorize me to act in some definite capacity as representing the U. P. S. Inc.

I would suggest you assign a title after the order of "Western Representative." and that you write me a letter to this effect bearing

the Company's seal, attested to by the Secretary and signed by you as President.

Yours very truly,

(S.)

FRANK SHEPHERD."

Plaintiff then testified that he proceeded to California in accordance with his plans and the plans agreed upon by Mr. Cordish, Mr. Yeager and Mr. Morris, and on his arrival first made investigations about the locations to commerce working upon and advertised in accordance with their instructions for managers for the individual stores. In order to secure these managers it was necessary to ask them for a subscription for \$2,500., but I was unable to offer stock in the Delaware corporation to anyone in California because it was necessary first of all to comply with California Corporate Securities Act, before I could sell stock in a foreign corporation or in a California corporation.

I received the following telegram from Mr. Cordish:

"To Frank Shepherd, Santa Fe train No. 3, car 39, Compartment C, Albuquerque, New Mexico.

39 "Just received word from attorney regarding incorporation for western states stop upon your arrival in California continue along the plans laid down up to fifty thousand dollars stop on my arrival will commence action as to forming new company.
NATL CORDISH."

I also received the following letter dated November 17, 1921;

"Mr. Frank Shepherd,
727 Story Building,
Los Angeles, Calif.

DEAR MR. SHEPHERD:

This is to advise you that a package of literature and printed matter was sent to you at the above address and should reach you no later than Monday, the 21st inst. As previously written you, we will send you from time to time any additional literature which we may receive and would ask you to kindly advise us when you are in need of any additional literature and we shall be pleased to send same to you without delay.

With best wishes, we are

Yours very truly,

UNITED PHONOGRAPH STORES, INC.,
H. I. ETTINGER,
Asst. Treasurer."

On November 19th I sent the following telegram from Gallup, New Mexico;

"Nat Cordish, 110 West 34 Street, New York City.

Thoroughly understand your telegram seventeenth stop. Kindly refer Master report pages nine ten and eleven write furnishing concrete examples arrangement with department stores and small town agencies using figures to illustrate also illustrate buying out existing stores, explain investment required managers' commission and everything. Would appreciate immediate reply special delivery.

(Signed)

FRANK SHEPHERD."

I also received the following letter froa Nat Cordish, Incorporated;

"Nat Cordish, Incorporated,
110 West 34th Street, N. Y. City.

November 22, 1921.

Mr. Frank Shepherd,
727 Story Bldg.,
Los Angeles, Calif.

40 "DEAR MR. SHEPHERD:

I have been extremely busy at this office and therefore unable to answer your wire of the 19th, sooner. Trust you arrived in Los Angeles O. K.

Considering that you are to devote your time for the present to raising sufficient funds to open a store in Los Angeles, I believe it best to await my arrival in Los Angeles and I will then take up with you the matter of department stores and small town agencies.

Regarding the buying out of established stores, we will not pay any amount for good will, but will purchase fixtures at agreed valuation and merchandise at inventory value.

Managers will receive 50% of net profits, with drawing account sufficient for living expenses, depending upon the caliber of the manager selected in the town.

I shall be pleased to hear from you if there is any further information you desire.

With kind personal regards, I am
Yours very truly,

NAT CORDISH,
President,
NAT CORDISH, INC."

I received the following letter dated November 23rd from Nat Cordish, Incorporated;

"Mr. Frank Shepherd,
727 Story Bldg.,
Los Angeles, Calif.

DEAR MR. SHEPHERD:

Mr. Cordish was compelled to be away from the office all day today and he telephoned me to write you, suggesting that you rent

any furnished office possible for the time being inasmuch as he expects to be in California between December 15th and 20th. He will then take up with you the matter of a permanent office and from the progress made by you until that time you will both be in a better position to judge just what your permanent needs will be.

We have several live wires whom we are working on for manager-ships and expect to commence operations in several new towns during the next week.

Trusting everything is going along nicely with you, we are

Yours very truly,

NAT CORDISH, INC.,
H. I. EFFINGER,
Secretary."

I received the following telegram from Mr. Cordish at
41 New York, dated November 25th;

"Frank Shepherd,
727 Story Building,
Los Angeles, California.

We don't propose selling foreign securities in California stop Aim is to organize California corporation stop Suggest getting money in proposed California company stop without permit unable to solicit business but Californians can invest in parent organization stop Howard very good according to Montalvo. Nat Cordish."

On November 25th, 1921, I wrote Mr. Cordish as follows:

DEAR MR. CORDISH:

I wish to thank you for your telegram of even date in reply to mine of the 23rd.

You are right that Californians can invest in the parent organization (Delaware Corporation) but I cannot secure a permit to solicit subscriptions for the Delaware Corporation without filing with the California Corporation Commission the data listed on page five and marked in pencil of the Corporate Securities Act, a copy of which is enclosed.

If you will refer to page fifteen of the Corporate Securities Act, you will see that we can solicit subscriptions for the California Corporation providing we file incorporation articles within ninety days, but I must first know at what you propose to capitalize the California Corporation, the number of shares of preferred and common stock, and the par value of each. The California laws do not permit the sale of common stock with no par value, and it is my understanding that the preferred and common stock must have the same par value. You will therefore see it is impossible for me to go ahead with the disposal of the stock without knowing your plans, if you will group it in units, what a unit will consist of and the price per unit.

After the above has been determined and you have advised me the details, I suggest you authorize me to secure the services of a local Corporation Attorney and have this matter attended to properly from the very beginning.

I wish to thank you for the information you secured from Mr. Montalvo regarding Mr. Howard. I think Howard could be lined up very well on a California Corporation, and I shall get in touch with him as soon as I am posted as to the incorporation particular.

42 "A copy of my telegram of even date is attached.
Very truly yours,

FRANK SHEPHERD."

On November 26th I wrote Mr. Cordish the following letter;

"DEAR MR. CORDISH:

I attach herewith an itemized account of expense to date, showing a balance on hand of \$344.90.

The office furniture and supplies, amounting to around \$400. have been charged to me personally, and I wish you would arrange to let me have a further advance with which to take care of this expense.

Yours very truly,

FRANK SHEPHERD."

On November 27th I wrote Mr. Morris at Washington, D. C., as follows;

"DEAR MR. MORRIS:

We have now been in Los Angeles a week without making any headway at all in so far as the raising of money is concerned, but during this time we have had an opportunity to realize just how hopelessly we were situated towards making any progress.

First of all, we find that the California laws prohibit the solicitation of subscriptions to any enterprise outside the State—like a Delaware Corporation—without such Corporation filing with the California Corporation Commission certified copies of its Articles of Incorporation, Charter, Statement of Assets and Liabilities, list of Officers and Directors and numerous other documents to be passed upon by the California Commission, and even if this were desirable in so far as the New York Office is concerned, it would necessitate a delay of approximately six weeks.

Mr. Cordish was, and apparently still is of the impression that we could solicit subscriptions to a California Corporation, sending such subscriptions to New York, where temporary certificates could be issued, and later to be converted into permanent certificates of the California Company. This we find can not be done. What we

43 can do is start from the very beginning with the idea of incorporating in California, solicit pre-subscriptions to the California Company providing Incorporation Articles are taken out within a period of ninety days after first soliciting such sub-

scriptions. However, before we can actually commence along this line we must first know the amount at which the California Corporation will be capitalized and the number of shares and the par value of both common and preferred. A further obstacle to be overcome in regard to the California Corporation is that the California laws prohibit the issue of common stock of no par value, and it is my further understanding that both preferred and common stocks must be of the same par value. All this information has been wired to Mr. Cordish and I have also mailed to him a copy of the California Corporate Securities Act.

Unfortunately, in ignorance, I have made several mistakes in approaching several influential people here with the idea of having them become associated with our enterprise. The most critical friend I interviewed was the President of one of the biggest Banks here who said I had nothing at all to offer, illustrating that I could not sell stock in a foreign corporation and later that we had no definite plans towards forming a California Corporation. It was through this interview that I was directed to the California Corporation Commission and secured the information in paragraphs two and three of the preceding page.

The only way in which we can make any progress is by retaining some Incorporation Attorney here and proceed immediately with the incorporation of a California Company. I have suggested this procedure to Mr. Cordish and requested authority to go ahead. It should be remembered in this connection that I have nothing on record as having authority to act as an agent or officer of the United Phonograph Stores, Inc., and since I am not aware that Mr. Cordish actually holds an officership in the United Phonograph Stores Inc., I would like to suggest that in the event he comes to California in December he should be properly fortified with authority to execute documents on behalf of the United Phonograph Stores, Inc., I am assuming, of course, that the Officers of the Delaware Corporation will have some financial interest in the California Corporation, and will be prepared to subscribe to its original stock. In this connection you will also appreciate that it is necessary that some members of the Board should be local men, and while I have in mind a few individuals I would not want to invite them to come along without first assuring an Officer of the New York Company they were actually desirable.

Through the medium of advertising I have interviewed five prospective managers, four of whom have the necessary money, the fifth being the most desirable of them all. He is
44 nothing short of a producer, having sold about \$95,000 worth of Knabe pianos last year. His position is practically a duplicate of that of Mr. Howser in that he could not be secured unless he could be assured we were able to handle the Knabe piano.

Another apparently good man is a Mr. E. C. Howard, a former resident of California and desirous of reestablishing himself here. I understand he is, or was connected with the Granby Phonograph Company, and until recently was traveling in the East establishing

agencies. He claimed to be very familiar with Mr. Montalvo in New Brunswick, and in communicating this information to Mr. Cordish I have his reply stating that Montalvo says Howard is 'very good'. Howard claims he is in a position to put up to \$40,000 in a California Corporation, providing he is on the inside. He seems to be thoroughly familiar with the doings of the United Phonograph Stores in the East, but believes this field would surpass them all if properly worked and incorporated locally, and it is only on the latter condition that he will be interested at all. He has requested me to get in touch with him later, or just as soon as I have a definite proposition to offer. I was considerably embarrassed in my conversation with Mr. Howard at not being able to answer his many questions regarding such matters as trade discounts and the securing of selling rights of different manufacturers. I should be taken into confidence regarding this information at once.

Another applicant was a whirlwind Chicago and Indiana piano and organ salesman who has the price, but not the local following being a resident here only since June. He is a strong believer in the Chain Store idea and the field which California affords, but he is smart and wants something definite.

I have written you at length regarding our actual position here, more because I feel closer to you than anyone in the organization, and particularly since you were the means of introducing me to the New York Officers, I know you all expected practically immediate results, but now that I have illustrated the handicaps under which I am working you will understand the apparent lack of progress to date.

I will now drift on to the inquisitive side of the doings in Washington. Finney is particularly interest in knowing whether or not Pierson was brought into the fold, and of course we are both interested in knowing whether or not you secured Mr. Howser. Has the City Club Store as yet been opened, and what news have you for us regarding the other locations in Washington?

We were promised a copy of the agreement entered into between the Ninth and Seventh Street Stores for our guidance in similar cases, and while we have had no use for such a document
45 it would be well to have it in our files.

At your convenience, I would also like some means of introduction to Governor Shaw's son at Santa Barbara, that is, if the Governor and yourself are still desirous I should meet him. Personally I think it would be well that I knew him.

I will take this opportunity to extend our regards to Mr. Reifkin, Col. Housong and Mr. Welling, and would request that during this period of ironing out the kinks of the California proposition we may still hold your confidence.

I am with kind personal regards to yourself,

Very truly yours,

FRANK SHEPHERD."

I received a telegram from Mr. Cordish dated November 28th, reading:

"To Frank Shepherd, 727 Story Bldg., Los Angeles. California company to have fifty thousand shares preferred fifty thousand shares common par value of both ten dollars each."

I then wrote, under date of November 28th to Mr. Cordish as follows:

"DEAR MR. CORDISH:

I acknowledge your wire of even date advising the California Company is to have a capitalization of 50,000 shares of preferred and 50,000 shares of common stock, par value of both \$10 each. While you do not say that this stock will be distributed in units, I presume it is your intention to dispose of multiples totalling \$250 but until definitely advised I can hardly make this statement to prospective purchasers.

Even though you have now decided to form a separate California Corporation and named its capitalization, I doubt the advisability of attempting to proceed with the selection of managers and the disposal of the units without first being able to list the names of Californians who will be behind this project. We are also not aware which officers, if any, in the Delaware Corporation, will desire to be associated with the California Corporation, and whether such Officers would be subscribers to the incorporation and for what amounts. Undoubtedly the two Corporations will have some mutual connection as, of course, the buying of merchandise will be through the Delaware Corporation.

46 "I have interviewed a number of worth while prominent men, mostly friends, here, and unfortunately have not been able to warm them up to the idea. I was naturally not surprised that my two Banking Friends were unable to lend their support in the formation of a California Corporation, but I had hoped they would be subscribers to the issue. However, I gather from their conversation they are not of the belief the business is so profitable, both of them speaking from the standpoint of discount paper, and I learned from them that a good many of the local concerns have had considerable difficulty in this particular, due in a great many instances to the migrating population. The severest setback I have encountered is the refusal of Mr. McKenna to lend his support to the proposition. I made two trips to see him, on the latter securing his undivided attention and leaving with the hope he was sold. Today I received his final answer, which I enclose herewith.

As matters now stand, I am frank to admit that I do not exactly know what is the next best move to make, and since you had counted upon my getting well under way from the beginning I realize that you will feel disappointed in the absolute lack of progress to date. For the past ten days I have labored under the following handicaps (1) the idea that we could sell stock in the Delaware Corporation (2) and the alternative stock could be sold in the California

Corporation. California laws prohibit the former without first filing voluminous documents with the local Commission, and in the latter case we were until today without the necessary information regarding the proposed capitalization and are still unable to name either Californians or Easterners who will comprise the Board.

I have not weakened in the slightest in my opinion that California affords a fruitful field for our project, but I am beginning to doubt my ability to break the ice. I wish it were possible for you or Mr. Yeager, or both of you to see this wonderful town and the apparent volume of musical business being done, as I am positive you would devise some plan to get the United Phonograph Stores going here. Once a start is made under a definite plan of procedure I feel there can be no question about its success. My candid opinion is that we immediately need a big enough man to explain the entire plans of the Company, its actual purchasing capacity—illustrating by figures our costs and profits, a true representative of our Board of Directors and whose word will carry weight with the biggest people here.

Yours very truly,

FRANK SHEPHERD."

47 The enclosure referred to in the last letter reads as follows:

"A. G. McKenna, Claremont, California,

Nov. 27th, 1921.

DEAR SHEPHERD:

After thoro consideration I have decided that I cannot help you by taking any stock in your company. I hope you will take this decision as final since I do not wish to be bothered by any business matters.

I am very sorry that I am forced to make this decision as I sincerely wish you success in the project.

Yours sincerely,

A. G. McKENNA."

I received the following telegram from Mr. Cordish dated November 29, 1921:

"Frank Shepherd, 727 Story Bldg., Los Angeles, Cal. Received your several letters stop. From what I can gather you are trying to do too much stop. Would suggest that you carry out your original plans as outlined before you left viz interesting several big men until you get about fifty thousand dollars together at that time we will buy or rent three stores stop. I would like to leave New York on December fifteenth for California but as you know I can leave only on condition that you will have things so lined up and enough capital interested to justify my trip stop. We are making plans for the California Company therefore you can go right ahead raising money in the proposed company at the rate of ten dollars for each share stop. Let me know whether you have made any progress in interesting people with money.

NAT CORDISH."

On November 30th I wired Mr. Cordish from Los Angeles as follows:

"Replying telegram have endeavored to carry out program outlined in New York but have been unable to get any influential men behind project either by subscribing or lending support. Howard is the only real prospect so far. Have also followed alternative starting by advertising and interviewing prospective managers but found only one suitable man. Have raised no money.

FRANK SHEPHERD."

48 On December 2nd, I wired Mr. Cordish as follows:

"Considering our proposition from every angle believe you should agree my returning east my own expense at once for personal conference as immediate prospects do not warrant your coming California. Finney has decided to quit. I will suspend activities awaiting outcome our interview. Answer tomorrow straight telegram.

FRANK SHEPHERD."

On December 2nd, I also wired the Nat Cordish Company as follows:

"Account not being able secure local officers for California Company would you consider proceeding with Delaware Corporation after filing papers required by California Corporate Securities Act. Believe this better procedure if prompt action taken and papers forwarded we could doubtless secure Commission's authority within two weeks. Should you not agree wire definitely what basis you are proceeding California Company naming officers and other information. We cannot solicit public without latter information or is it advisable to accept three prospective managers' investments. Also I have no authority to accept and receipt for subscriptions as Company's agent no temporary certificates to issue or authority to execute same.

FRANK SHEPHERD."

I also wired Cordish as follows:

"Approached two more big men today but cannot win them over. Have three exceedingly good manager prospects and will probably close this week.

FRANK SHEPHERD."

About this time I received the following telegram from Mr. Cordish:

"If you think it best to come to New York; will be here later part of week. Do what you think best.

(Signed)

NAT CORDISH."

And on December 4th wired Mr. Cordish as follows:

"Expect to leave Tuesday and be New York Monday, December 12th.

(Signed)

FRANK SHEPHERD."

49 On December 4, 1921, I wrote to Mr. Morris enclosing copy of letter to Mr. Cordish as follows:

“DEAR MR. CORDISH:

Your telegram of the third was received this morning, and since I believe it best to have a conference with you before proceeding further with the California Company, I will arrange to leave for the East in a day or two, stopping at Washington probably overnight and be in New York the first of next week.

It would seem to me that the reasons for lack of progress are:

1. That I was not in a position to answer definitely any of the questions raised as to the cost of merchandise, discounts on the different articles, and exactly how we arrived at our estimate of profits. These points were raised by the few influential friends I have here, all of whom know my past business experience and were aware that I knew very little, if anything, about the musical business. While I appreciate all these men were business friends, their conversation and decision only went to show my inability, through lack of information, to approach outsiders.

2. The uncertainty as to whether it was advisable to preach a California Company or go ahead with the Delaware Corporation which is already a going concern with prominent men as officers. From the standpoint of the average Californian a local corporation is decidedly preferable, but on account of my inability to secure local capitalists there seemed to be no other alternative than the Delaware Corporation.

3. The difficulty of interesting local capitalists in either a California or foreign corporation without inducement in the form of bonus stock. This was strongly impressed upon me in my conversation with a successful promoter. It is my understanding that the California laws are difficult to get around in this particular in that they prohibit the giving of bonus stock, but this could probably — overcome by having the California Company assign to me certain shares of stock in consideration of my assigning to the local Corporation the California territory, and I in turn can use part of this stock as a bonus in securing officers and Directors. I further understand officers and Directors in a California Company assume double liability on their stock, and stamping on certificates the words “fully paid and non-assessable” therefore has no meaning.

4. My inability to secure suitable managers. Through advertising and mutual friends I have interviewed some twenty prospective managers three of whom hold prominent positions in local musical concerns. The latter three know the business so thoroughly
50 that my attempt to explain to them our manager’s proposition received only secondary consideration, they being primarily interested in the goods we could handle, and inasmuch as I could not go into this matter in detail you can understand why I was not able to hold their interest. I should add that we have not been able to explain to these prospects exactly what they would receive for their investment—stock in a California Company or the

Delaware Corporation. We have interviewed other applicants that have the price, but not of a desirable type, and let them go.

My conclusion is that we must take the necessary time to form a California Company, making provision for the necessary inducement to secure local officers, and have one of the New York officers on hand to thoroughly outline our proposition and stay with it until such time as we are ready to proceed with a California Company.

Yours very truly,
(Sgd.)

FRANK SHEPHERD."

I received the following letter from Mr. Yeager after I returned to the east:

"United Phonograph Stores, Inc.,
Executive Offices Third Floor,
110 West 34th St., New York City.

December 16, 1921.

Mr. Frank Shepherd,
Penn-Harris Hotel,
Harrisburg, Pa.

MY DEAR MR. SHEPHERD:

I received the copy of your letter to Mr. Cordish and note contents carefully.

I am sure that Mr. Cordish will take care of your wants at the very earliest possible moment. Mr. Morris is here and we had a long talk about you and your prospects with the Company, today.

Our conference has brought good results and we believe that a firm understanding which took place today will redound to the correcting of any oversight of whatever nature in the future. I shall be interested in your case and want to hear from you as to the results obtained by your good self.

I mailed you to general delivery, a pair of contracts for manager of store. As these are typewritten I would not mutilate them
51 in any way until you have your man assured with his money paid down. Then you are hereby given authority to execute the contract.

The manager should put up \$2,500.00 to secure a manager's contract. It is optional with the manager whether he retains the stock or receives his money back upon securing of the 100 cooperators. Keep me posted as to your program. With kind personal regards, I am

Yours very truly,
(Sdg.)

H. W. YEAGER,
President, United Phonograph Stores, Inc."

I left California on December 4th, 1921 and arriving in Washington, D. C., saw Mr. Morris and told him I was unable to proceed with the proposition in California on account of their failure to comply with the Corporation Securities Act. He suggested that I go to New

York and see Mr. Cordish and straighten it out with him. He added that I should never have gone out with as little information as I apparently had; That he was under the impression that Mr. Cordish had all of this California Co. prepared. I went to New York, met Mr. Cordish and Mr. Yeager and explained my position to them. They seemed to hesitate considerably about complying with the California Corporation Securities Act, and agreed and realized that I could not proceed until they did that, and I protested hanging around in New York waiting until such time as they wanted to go ahead, and they suggested that I make a trip over to Harrisburg and Lancaster, and in the meantime they would go into the matter again. I went to Harrisburg and Lancaster for them and returned to New York in January, right after New Years, and they had not done anything, nor were they in a position to advise me what they were going to do. I returned to Washington and explained to Mr. Morris, and he told me that it would be several months before they could get together and proceed with the California proposition.

52 I received the following letter from Mr. Yeager dated December 30, 1921:

"DEAR MR. SHEPHERD:

I am very much grieved to come into the possession of all the facts relative to your connection with the fiscal agent Department. Some things seem to tell me that there is a word due you, hence this letter.

I know how you feel; I further know that you have grounds for your telegram to Mr. Riefkin, about which he called me up on the phone and read to me. Should you sever your endeavor with our company, as originally planned out, I would feel grieved. I am writing this letter believing that somewhere, somehow there is a way around this, in order that you may receive your just due and the company not be deprived of your honest efforts. I have just wired you, as follows:

'Your status with fiscal agent interests me. When can you come to New York. Important letter general delivery Latrobe Answer
H. W. YEAGER.'

I understand Mr. Cordish has arranged that matter your checks have not gone back. I know the effort he put forth to procure it, still this undoubtedly would not interest you.

Upon receipt of this letter, kindly sit down and write me a letter addressing me personally. I- you can come to New York, so much the better.

I am, with kind, personal regards,

Very truly yours,

(Sgd.) UNITED PHONOGRAPH STORES, INC.,
H. W. YEAGER,
President."

The checks he refers to are the three checks which were previously referred to in Mr. Cordish's letter to me of November 14th, to cover railroad fare, traveling expense and office expense in California.

They were the checks of Nat Cordish. The checks were thereupon received in evidence subject to the exception previously noted that Mr. Cordish's relation to the defendant company had not been shown.

53 Whereupon plaintiff offered in evidence telegram from Nat Cordish dated December 19th, to plaintiff at Harrisburg, Pa., reading as follows:

"Reference commission McKenna sale will take care of you Wire us route for next few days also progress."

Chge United Phono. Stores, Inc.

And also the following letter received by plaintiff from the President of the defendant Company:

"United Phonograph Stores, Inc.,
Executive Offices, Third Floor,
110 West 34th St., New York City.

January 4th, 1922.

Mr. Frank Shepherd,
815 Union Trust Bldg.,
Washington, D. C.

MY DEAR MR. SHEPHERD:

I received your letter this morning and perused its contents carefully. I note your decision and I personally desire to state that I regret this very much as I had looked forward to close association with you in the future. I fully realize that you have grounds for your statements, but I was still wondering that possibly there might be some way to locate in your broad mindedness common ground, whereby we could still have the association which I had hoped for.

I entered into everything with you, which fell to my humble lot, with sincerity and confidence. I wish to reiterate my former statement, I would feel very much grieved to know that the confidence placed in all the others should be shattered. I have always figured an upright man's friendship as an asset in life, whether it be in a business or social way. Truly there must never be any difference between you and I.

I cannot give up the thought that somehow there can be a readjustment of any differences through elimination process which will redound to the welfare of your good self and the writer and my valued associates.

With kind personal regards, I am
Yours very truly,

H. W. YEAGER,
President, United Phonograph Stores, Inc."

54 Plaintiff further testified that after the last mentioned letter was written he went to New York the first week in January at Mr. Yeager's request and saw both Mr. Yeager and Mr. Cordish at

the office of the defendant. They had a conversation regarding the checks of Nat Cordish, Incorporated, on which payment had been refused. They both told him that the checks would be taken care of and the rest of our negotiations would continue smoothly.

Plaintiff thereupon offered in evidence, the following telegram:

"New York, Dec. 29, 1921.

"Frank Shepherd, care Western Union, Latrobe, Pennsylvania.

Arrangements have been made with Guaranty Trust Company to take up check Friday morning.

(Signed)

NAT CORDISH, INC."

After the meeting in New York, I returned to Washington to await their convenience to proceed with the California Corporation, and the necessary information in order that I could return to California. Mr. Morris advised me in Washington that it would be probably some months before they could get the California Corporation in shape, and their plan in general.

Plaintiff thereupon introduced in evidence the following letter:

"Washington, D. C., Jany. 9, 1922.

Mr. Nat Cordish,
110 West 34th Street,
New York City.

DEAR MR. CORDISH:

I acknowledge your letter of January 6th, together with copy of your letter to the California Bank of Los Angeles, and will anticipate advice from the Bank that this matter has now been straightened out.

Today I had a long talk with Mr. Morris regarding my association with the United Phonograph stores, Inc., and gathered from this conversation that it would undoubtedly be several months before the Company could proceed with the California proposition. Mr. Morris suggested my working some other territory in the meantime, but I am not interested in such a proposition, having joined your organization with the definite understanding of locating in the West, and specifically in Los Angeles.

Since we are unable to get together on the California proposition it would seem best that I seek employment elsewhere, and I am proceeding along that line.

Will you therefore arrange to retire the stock for which I subscribed towards forming a California Company by instructing me on which Bank the United Phonograph Stores, Inc., will honor my sight draft with stock certificate attached. I would ask immediate action on this matter, or I shall proceed to recover my subscription through the only alternative course.

I shall anticipate your answer, together with instructions, by return mail.

Very truly yours,

FRANK SHEPHERD."

Copies of this letter were sent by me to Mr. Yeager and to Mr. Morris. The definite understanding referred to by me in this letter was that during my entire negotiations with Mr. Yeager, Mr. Cordish and Mr. Morris, and also in my application that I was to locate in the West. The three of them jointly assured me that a California Company was to be formed and I specifically joined their organization under that understanding, and my subscription of \$2,500.00 was made to that Company.

It was further provided that until this California Company was formed that I should accept \$2,500.00 worth of stock in the Delaware Corporation as a temporary receipt for my subscription which would later be converted into the stock of the California Company. This was never done.

Whereupon the following occurred:

“Q. Did they make any statement as to what they would furnish if you would deliver that? A. In consideration of my furnishing \$5,000—\$2,500 of my own and \$2,500 which I obtained from a friend, making \$5,000 in all—that they agreed to match
56 my \$5,000 with a \$5,000 jointly between them to start the California company with a capital of \$10,000.

Q. Was that ever done? A. It was never done.

Whereupon counsel for the surety interposed and moved to strike out the foregoing answer on the ground that there was no such allegation or claim in the declaration, nor any reference of any contract involving contribution by anybody else to the California Company, nor any allegation that the California Company was to be formed. In other words that there was a variance. Said motion was, however, overruled and the Court at the request of the counsel for the surety, duly noted an exception.

Thereupon plaintiff introduced in evidence the following letters:

“Mr. Frank Shepherd,
815 Union Trust Building,
Washington, D. C.

“Jan. 6, 1922.

DEAR MR. SHEPHERD:

Please find attached copy of letter which we have this day mailed to the California Bank of Los Angeles.

We regret that this matter has not been taken care of sooner.

With kind regards, we are

Very truly yours,

NAT CORDISH, INC.”

“January 6, 1922.

California Bank,
Los Angeles, Calif.

GENTLEMEN:

We have this day wired you, via Western Union, \$826.00 with the following message included—

'To pay checks like amount Frank Shepherd account.'

We also telegraphed you as follows—

'Western Union will deliver Eight Hundred Twenty-six Dollars for Frank Shepherd checks today.'

Will you kindly advise us of the receipt of this money and return cancelled checks to this office?

57 Thanking you to give this your attention, we are
Yours very truly,

NAT CORDISH, INC."

"Washington, D. C., January 10, 1922.

Mr. J. V. Morris, Vice President,
United Phonograph Stores, Inc.,
815 Union Trust Building,
Washington, D. C.

DEAR MR. MORRIS:

In accordance with our conversation of even date, I am prepared to reconsider my withdrawal from the organization of the United Phonograph Stores Inc., providing you can carry out your several suggestions made today:

1. That you immediately arrange to have issued in my favor the 50 shares common stock promised by Mr. Cordish as a bonus on my original subscription to 100 shares of common stock. I further understand you will endeavor to secure for me an additional stock bonus providing I agree to hold this for a definite period, to be stipulated by yourself.

2. That I immediately receive a check to cover commission due me on the sale of \$2,500 worth of stock to Mary M. McKenna early last November.

3. That a thorough and definite proposition is made to me by a reputable fiscal agent of the United Phonograph Stores, Inc., along the lines of opening up new territory such as Philadelphia, and provision by said fiscal agent of sufficient funds to cover the opening of an office, advertising and incidental expense, and a personal withdrawal account for a specific period, with the understanding that any such money advanced is chargeable against commissions earned on the sale of the stock of the United Phonograph Stores, Inc., in such territory.

As I have several propositions under consideration, and a definite offer still open for a few days, I will defer consideration of these for the balance of this week in anticipation of your being able to adjust my present status with the United Phonograph Stores, Inc.

Very truly yours,

FRANK SHEPHERD.

I received no reply to that last letter.

58

January 10, 1922.

"Mr. Frank Shepherd,
815 Union Trust Bldg.,
Washington, D. C.

MY DEAR MR. SHEPHERD:

I have received both your letters of January 9th and the one previous to that. I note very carefully all you say therein. I will certainly use every influence possible to carry out an equitable plan for you.

I am only one of the Board and can only speak for myself. I certainly have appreciated your sincere cooperation and everything that you have done so far.

I have received copy of your letter to Mr. Cordish and as Mr. Morris I understand is on his way to New York now, we shall take the matter up upon his arrival.

I am with kind personal regards
Yours very truly,

H. W. YEAGER,
President, United Phonograph Stores, Inc."

Just prior to my writing that letter of January 10th to Mr. Morris and the letter last read, Mr. Morris asked if I would take some temporary employment in the East until such time as they could proceed with the California Corporation, just as I had done at Mr. Cordish's request of December 30th, going to Harrisburg and to Lancaster, and I agreed to do that until such time as they could get this California Corporation in shape.

Plaintiff thereupon offered in evidence the following letter:

"United Phonograph Stores, Inc.,
Executive Offices, Third Floor,
110 West 34th Street, New York City.

January 14, 1922.

Mr. Frank Shepherd,
815 Union Trust Bldg.,
Washington, D. C.

MY DEAR MR. SHEPHERD:

I never felt quite so happy over my connection with the United Phonograph Stores, Inc. as I do today.

59 Mr. Morris will have a very interesting tale to tell you when he arrives in Washington. In the meantime I shall have nothing further to say. Kindly await his coming.

I am, with kind personal regards
Very truly yours,

H. W. YEAGER,
President, United Phonograph Stores, Inc."

Prior to receiving the last letter, I had a conversation with Mr. Morris and Mr. Yeager in Washington. They both told me of friction in defendant's organization and they were endeavoring to get the control of the Company out of Mr. Cordish's hands. Mr. Morris went to New York for that purpose and when he returned he told me he had been successful.

Thereupon plaintiff introduced the following letters in evidence:

Mr. Frank Shepherd,
815 Union Trust Bldg.,
Washington, D. C.

"January 17, 1922.

MY DEAR MR. SHEPHERD:

I received your telegram and I catch the spirit and intent of it. Mr. Morris and I had a long talk about you and we are both of the same opinion. I will not go into detail in explaining the reconstruction of this whole affair, he will do that.

We have turned over the fiscal representation to one of the best houses in New York City and have eliminated all of the undesirable features which you objected to. In other words, as soon as we get the Harriman Company functioning, the Company should go forward with very little in the way to a quick and commensurate success. Mr. Morris wanted to talk with you and then we will plan something in the Company which will place you in a position where it will be satisfactory to your good self. It has been embarrassing, tedious, aggravating and a problem to solve. However, this has been done.

After your talk with Mr. Morris, I wish you would write me and I will immediately then get in touch with Mr. Morris and yourself when we can lay our plans. I have felt right along that there was some way to get the unpleasant aspect of your former connection behind us.

60 Believe me, Friend Shepherd, I am with kind personal regards,

Yours very truly,

H. W. YEAGER,
President, United Phonograph Stores, Inc."

"January 17, 1922.

DEAR MR. MORRIS:

Referring to our conversation of to-day, I will agree to proceed to Philadelphia approximately the middle of next week subject to the following conditions:

That a contract is prepared at once by the Public National Company for my signature agreeing to a flat commission of 25% on all sales of stock of the United Phonograph Stores, Inc., with a further stipulation they will guarantee me a drawing account of \$100.00 a week, payable in advance and chargeable against commissions earned.

That you arrange for the immediate delivery to me of 50 shares common stock of the United Phonograph Stores, Inc., as agreed.

That the \$375.00 commission due me on a previous sale of stock will be paid within two weeks from to-day, either by Mr. Cordish or yourself.

Yours very truly,

FRANK SHEPHERD."

Then it says:

"Accepted: J. V. Morris, Frank Shepherd (In triplicate.)"

The witness thereupon testified that although a dividend was paid on stock of the defendant company January 3rd, 1922, none was paid to him, and introduced in evidence the following notice:

"United Phonograph Stores, Inc.,
Executive Offices, Third Floor,
110 West 34th Street, New York City,

December 5th, 1921.

DEAR CO-OPERATOR:

Glad Tidings!

The progress of the United Phonograph Stores, Inc., during its first year has enabled your Board of Directors to declare a Dividend to all fully paid subscribers of the Preferred Stock (eight per cent annually) as of record on December 20th, 1921.

61 There will also be declared a sixteen per cent Stock Dividend to all fully paid subscribers of the Common Stock as of record on December 20th, 1921.

Attached hereto is a statement of your account as it now appears on our books. By paying the balance on your full subscription before the closing of our books you will participate in the Dividends as stated above.

Please note that Stock Dividend will be only to fully paid stockholders as of record on December 20th, 1921.

The books of this Company will be closed from December 20th, to January 3rd, 1922.

Yours very truly,

UNITED PHONOGRAPH STORES, INC.,
President."

Plaintiff thereupon introduced the following telegrams both dated Washington, D. C. in evidence:

"February 11, 1922, addressed to Harvey I. Ettinger, c/o United Phonograph Stores, 110 W. 34th Street, New York City.

Morris suggested I ask you communicate with Cordish and request he immediately accommodate me with check covering three hundred seventy-five dollars commission. Am in urgent need of money on account hospital and specialist expense. If United Ponograph can also reimburse me last week's expense would appreciate it. Advise.

FRANK SHEPHERD."

"February 16, 1922, to Mr. H. W. Yeager, President, United Phonograph Stores, Inc., 110 W. 34th Street, New York City:

Telegram received. Kindly cancel any arrangements requiring my services. Have been loaded with promises too long. Both Cordish and Morris have failed to carry out their agreements and I am definitely through. My attorney will hereafter represent me regarding United Phonograph matters. Kind personal regards.

FRANK SHEPHERD."

Witness thereupon testified that the item of \$2,500 mentioned in his bill of particulars as cash advanced, was his original subscription of \$2,500; that he never received this back from the defendant except by the issuance of the stock certificate. The 15% commission on sale of \$2,500 worth of stock refers to the stock sold Mary M. McKenna. This was never paid. The balance due on traveling expenses was incurred at the request of the defendant and was never paid him. With reference to the claim under the head "drawing account." Witness stated he never received a cent of money from the defendant and that the claim should only be for two months drawing account, and not three.

Cross-examination:

I started for California November 15, 1921 and had several talks with Mr. Cordish, fiscal agent of the defendant, about selling stock, before going. I did not tell Mr. Cordish during these talks that I could interest certain people in California in the organization of a corporation and the purchase of stock. I did try to interest Mr. McKenna in the purchase of stock but he refused to purchase.

My letter of November 25th, 1921 to Mr. Cordish was written after I had made investigations in California regarding the sale of stock there for him. The letter was with regard to selling the United Phonograph stock for the United Phonograph Company. It was in regard to the organization of a United Phonograph Stores California Company.

The letter I wrote Mr. Cordish on the 28th of November refers to a wire I received from Mr. Cordish on the matter of the capitalization of 50,000 shares of preferred and 50,000 shares of common in a California company. I did not endeavor to organize a company for 50,000 in California as I had no forms to proceed with it, and no such authority. I remained in California from November 19th to December 4th.

I received the three checks for \$826.00 from Mr. Cordish mentioned in the letter of November 26th. They were not good but I subsequently got the money. The \$350.00 a month drawing account referred to in the declaration was to be advanced to me in lieu of the time necessary to get started with the sale of stock. It was to be charged to the California office. It was agreed before I left that that \$350.00 a month was to be paid me for a period of two months, realizing that in that space of time that it would probably be not possible to sell much stock, and subsequently

that advance was to be charged against the California Company—the California office expense.

I never entered into any agreement to sell stock for the Public National Company. While in California I represented the United Phonograph Stores.

In the letter of November 16th, I said:

“I need hardly mention to you that this matter has caused me considerable embarrassment and also has caused me to lose all confidence in the proposition that we jointly entered into.”

The embarrassment referred to was caused me on account of the non-payment of the checks. They were the checks of Nat Cordish Incorporated. The words “the proposition we jointly entered into” refer to the agreement jointly entered into with Cordish, Yeager and Morris in New York at the time I was negotiating for the California agency.

I received the telegram dated November 17th from Cordish at Albuquerque, New Mexico, which reads as follows:

“Just received word from attorney regarding incorporation for western States. Upon your arrival in California continue along the plans laid down up to \$50,000. On my arrival will commence action as to forming new company.”

64 My plan in New York with Cordish was not to go to California and raise \$50,000 capital. In response to the last mentioned telegram I wired Cordish that I thoroughly understood its contents. My understanding of it was this; we talked over in New York prior to my departure, that we would go ahead and try to raise money. No specific amount was named but I understood that he wanted to see \$50,000 raised for forming the California company.

I received the telegram of November 29th from Cordish in which he said:

“Suggest you carry out your original plans as outlined before you left, viz interesting several big men until you get about \$50,000 together. At that time we can buy or rent three stores.”

I interviewed several men, who might be called big men, but never put up any proposition to them in any amount. I never wrote Cordish or told him that it was not the agreement between us before I left for California, that I was to raise \$50,000 for the purpose of operating stores in California for there was no such understanding.

I wrote a letter to Mr. Yeager in which I said:

“Referring to the last paragraph of your letter, I would ask that you exercise the elimination process by using your official capacity as President of the United Phonograph Stores, Inc., toward the immediate retirement of my subscription. If you will kindly do this I will keep my mouth shut, but in the absence of immediate action I shall follow the only alternative of advertising in communities in which you are now operating.”

I did not intend that letter as a threat but intended to say that I was dissatisfied as a cooperator and had been mishandled.

Redirect examination:

Witness offered in evidence a cash book containing entries of receipt of checks aggregating \$826.00 and showing disbursements exceeding that amount.

Recross examination:

All these entries were made between Nov. 14 and Dec. 29, 1921, the checks being made good Jan. 6, 1922.

65 Thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness **Harry W. Finney**, who testified as follows:

I never had any direct connection with the defendant but *was* introduced Mr. Shepherd to a Col. Houston at the defendant's office in the Union Trust Building, Washington, D. C. Mr. Morris, Vice President of the Company, was there, Mr. Welling, one of their salesmen, and a Mr. Riefkin. There was a general discussion about the plans of the defendant who was opening stores throughout the country. Later I was present at a good many interviews between Mr. Shepherd and Mr. Morris, all relating to the employment of Mr. Shepherd as a California representative of the United Phonograph Stores. Mr. Morris was seriously considering Mr. Shepherd for their California representative and had gotten a complete history of his life from him. I also know that later Mr. Shepherd was so employed and I went to California with him and was there the full length of time he was there. We were unsuccessful in California because we were not able to proceed there as a Delaware corporation, nor were we able to secure from New York the papers which we were required to file before we could qualify as a California corporation.

Cross-examination:

We were in California about two weeks and tried to interest people in the organization of the corporation there. We had one man who said he would be interested in the formation of a California company. He claimed he had \$40,000 to put into it if the proposition were lined up and went as a California corporation. We obtained no
66 actual subscriptions to stock. After I returned on December 4th, I had no other connection with the matter.

Thereupon the plaintiff announced his case as closed.

Whereupon the defendant to maintain the issues on its behalf joined, offered in evidence a duly certified copy of the bankruptcy proceedings in the District Court of the United States for the Southern District of New York, in the matter of the bankruptcy of the defendant, United Phonograph Stores, Incorporation, to which offer

the plaintiff, by his counsel then and there objected. Counsel for the defendant then stated to the Court that he intended to make a motion for a directed verdict, before doing so he made the preceding offer to show that the adjudication in bankruptcy of the defendant took place within four months of the levying of the attachment before judgment in this case, the attachment having been made on February 21, 1922.

Defendant also offered in evidence the proceedings in bankruptcy cause #1307 in the Supreme Court of the District of Columbia in the matter of the bankruptcy of the defendant. The purpose of the latter offer being to show that the property of the defendant attached before judgment in this cause, was sold under order of the Supreme Court in the ancillary proceedings had in said cause #1307. But the Court sustained the objections to the admission of said records in evidence, to which ruling counsel for the defendant requested the Court to note an exception; the ground of said exception being that the adjudication in bankruptcy, and the taking over of defendant's property by the trustee in bankruptcy, and the subsequent sale under the order of the Supreme Court of the District of Columbia, operated to release the surety whose undertaking was to abide
67 and perform the judgment of the Code relating to said property and that the action of the Court in ordering the sale of the property made it impossible for the surety to produce the same in the event of judgment.

Thereupon it was agreed in open Court between counsel for the respective parties that the property in the District of Columbia of the defendant, involved in said attachment, was sold at the instance of the trustee in bankruptcy acting under the order of the Supreme Court of the District of Columbia in bankruptcy cause #1307, and also by order of the United States District Court for the Southern District of New York sitting in bankruptcy. But counsel for the plaintiff objected to the admissibility of said testimony on the ground that it was immaterial, which objection was sustained by the Court.

Whereupon counsel for all parties having announced that there was no further testimony to be offered, counsel for the surety company moved for a directed verdict.

First. On the ground that the trustee in bankruptcy of the defendant and not the United Phonograph Stores, is the proper party defendant.

Second. That as shown by the Court records offered by the surety and excluded by the Court, the attachment in question was levied within four months of the adjudication in bankruptcy and therefore void under the bankruptcy act.

Third. That the whole proceeding should be stayed because of the bankruptcy.

Fourth. That the defendant being in bankruptcy, the Court is without authority of law to try and render a judgment in
68 the cause against the defendant, and hence no judgment could be rendered against the surety on the undertaking for the release of the attached property.

Fifth. On the ground that there is a variance between the allegations of the declaration and the proof, that is, between the contract alleged in the declaration and the testimony of the plaintiff, but the Court overruled said motion and at the request of counsel for the surety company, duly noted an exception thereto.

Thereupon the defendant offered the following prayer which was denied by the Court and an exception duly noted:

“If the jury believe from the evidence that the plaintiff voluntarily returned from California on December 4, 1921, then they are instructed that even if they find for the plaintiff they can only allow him such portion of the drawing account claimed by him as
69 accrued between November 15, 1921 and December 4, 1921, and that such sum should be *charged against* the sum of \$375 claim by plaintiff as commission for sale of stock.”

Thereupon the Court of its own motion charged the jury as follows:

“The Court (Mr. Justice Siddons.) Gentlemen of the Jury, there is a very simple issue of fact here for your determination. The plaintiff has come into this court bringing this suit against the United Phonograph Stores Corporation, and he alleges in his declaration that he and the defendant company, on or about November 1st, 1921, entered into a contract which he sets out in his declaration in a brief form, and the contract which the plaintiff claims was made between himself and this company was that if he, the plaintiff, would put into or cause the sum of \$5,000 to be put into the business of the defendant, the defendant would open up a branch office in Los Angeles, California, and place the plaintiff as its agent in charge thereof, and to allow the plaintiff a drawing account of \$350 for a period of two months from November 15, 1921, payable on the first and fifteenth of the month, chargeable against a stipulated commission of 15 per cent on all sales of stock of the defendant corporation made by plaintiff, and the defendant further promised and agreed to pay the plaintiff's traveling expenses. Then he proceeds to allege first, that the plaintiff did pay or cause to be paid into the defendant company the \$5,000. There is evidence tending to show that of that \$5,000, \$2,500 came out of the plaintiff's own pocket and the other \$2,500 he raised by selling stock in the defendant corporation. He says that that contract was made, he complied with his part of it, and you have heard the testimony. There is testimony tending to show—it is for you to say what you shall believe about it, what you shall do with it, because you are the exclusive judges of the testimony, and the probative value of the testimony adduced before you. I am not saying a word to you that you must for a moment interpret as an opinion that I may have on the subject. You are the judges and you alone. But, as I say, there is testimony tending to show that the plaintiff, after he says the contract was arranged or entered into, he paid over this \$5,000, paid or caused it to be paid to the defendant company; that he then went to Los Angeles and he complained that, notwithstanding all of that, the defendant company never carried

out its part of the bargain and never did open the Los Angeles office.

70 So of course, the first question for you to determine is whether you are satisfied by a preponderance of the evidence that the plaintiff and defendant entered into the contract set out in this declaration. If you find and you are satisfied by a preponderance of the evidence that they did so, the next question for you to determine from the evidence is whether it was carried out, both by the plaintiff and the defendant. The plaintiff cannot complain, of course, of a breach of the contract by the defendant if he himself breached it, but the issue that is submitted to us, the defense that is interposed here, is that they never entered into this contract.

Now, did they? If you find that they did enter into this contract of the tenor and character briefly outlined in this declaration which I have read to you, then you have to consider whether or not the defendant breached it; that is, whether the defendant has failed to carry it out, because of course you must find that before you would be justified in making any award against the defendant company. Did it breach it? Did the plaintiff do what he was required to do under this contract, if that contract was entered into, and offer to do, what else he was required to do under the contract, and did the defendant wholly fail on its part? If it did, if the defendant did not carry out this contract, and breached it, then, says the plaintiff, I must have my \$2,500 back that I put in here as a part of the stipulation on my part to be performed, and which I did perform, and I demand that I be refunded the \$2,500 which I paid. Not only that, but the contract was that you, the defendant, would pay my traveling expenses. Now, you have not paid that up to the extent of \$175, says the plaintiff. I therefore claim that you should pay that. That was one of the conditions of the contract that you had broken and I demand the payment of that. And then, says the plaintiff, you agreed, as a part of the contract, that you would allow me a drawing account for two months at the rate of \$350 a month from November 15, 1921. I left here for Los Angeles, pursuant, says the plaintiff, to the requirement of the contract, in the expectation that you, the defendant would set up the Los Angeles office, which you, says the plaintiff, agreed to do, and I went to Los Angeles, and you did not do it. You have refunded some of the traveling expenses, there is some little testimony here, but you have not refunded all by \$175. Therefore I demand that as a part of the loss which I should otherwise not have suffered by reason of your, the defendant's, violation of this contract. He says 'I am entitled to the two months drawing account at \$350 a month.' It is true, as it has been explained to you, that the claim was made for three months, and the court indicated, and counsel for the plaintiff, recognizing

71 the probability that he could not establish that claim under the contract alleged, and the plaintiff abandoned it as to one item of \$350, but he does claim two months drawing account, \$700. The claim is that as a matter of fact he spent more time in the Company's affairs than two months but he is claiming on this contract and he cannot recover more than the contract gives him, if you

should find that any such contract was made at all as the plaintiff sets up in his declaration.

There is but one item about which I want to say a word to you. A part of that \$5,000, it will appear, if you accept the testimony in this case, that the plaintiff was to pay over or cause to be paid, was accomplished apparently from the testimony by the sale of stock in the defendant company to some person named McKenna, and there is evidence tending to show that \$2,500 representing that subscription was in fact paid into and received by the defendant company. It was a stock subscription. It was a method apparently that Mr. Shepherd resorted to to make up the \$5,000 he had to put in under the terms of his contract. Now, the terms of the contract as I have already indicated to you, if such a contract was made between the parties, provides among other things, for the drawing account chargeable against the stipulated commission of 15 per cent on all sales of stock of the defendant corporation made by plaintiff—the plaintiff claims that this particular subscription represented by the McKenna stock entitled him, he says, to a commission of 15 per cent, and you have heard the evidence relating to that. If that was the contract, if that is what the parties meant by the contract in question, and you find that there was this \$2,500 subscription obtained and the parties intended that the plaintiff should be paid a commission on the subscription obtained by him, it will be your duty to include that in your verdict as claimed here. However, if you should not be satisfied by the evidence that that 15 per cent commission on that particular subscription was within the intent and meaning of the parties, then you will disallow that claim, if that be your view, the view that you should take of the testimony in that single particular; then the claim having been reduced by the withdrawal, as I understand counsel for the plaintiff, of one month's drawing account of \$350, that would reduce the claim, as Mr. Chamberlin pointed out to you, to \$3,750. If you should not be satisfied by a preponderance of evidence that the parties intended that Mr. Shepherd should receive a 15 per cent commission upon the stock, the \$2,500 subscription to the stock of the company which he procured, and which was a method he used or resorted to to make up that \$5,000—I use that language; of course, I am not implying anything improper

72 here; the language used is that he might pay or cause to be paid in, he might cause it to be paid in in half a dozen ways—

I say he resorted to the expedient of selling the \$2,500 worth of stock, and he claims a commission on that. You must find that within the purview, intent and meaning of the parties under this contract, that that rate should be paid on that kind of subscription, under such circumstances, and then you should deduct that item if you should otherwise find for the plaintiff in this case, you should deduct that, cutting off \$375 from \$3,750, if you shall find that there was such a contract as alleged in this declaration, and that the plaintiff fulfilled his part of it, stood ready to carry it out in its entirety, and that the defendant failed. As I have already pointed out to you, that is necessary for your determination.

The burden of proof is upon the plaintiff in this case. Corre-

spondence in the form of telegrams and letters and oral testimony as well, is offered here by the plaintiff in support of his case. It is for you to say what the truth of this matter is.

I do not think that there is anything more that I can say to you that would be of any particular aid."

Be it remembered that the foregoing comprises the substance of all of the testimony in this case and all of the proceedings in the trial, of said case, and all of the exceptions reserved by the defendant and allowed by the court, before the jury retired and entered upon its minutes, and counsel for the defendant then and there prayed the court to sign this its Bill of Exceptions, to have the same force and effect as if said exceptions had been separately and severally set out in separate Bills of Exceptions, and at the request of counsel the same is accordingly signed and made a part of the record in this case, now for then, this 25th day of February, 1925.

F. C. SIDDONSON,
Justice.

Feb. 18/25.

Satisfactory: Hamilton & Hamilton, for Fidelity & Deposit Company.

CHAMBERLIN & SMITH,
Attys. for Frank Shepherd.

73 At Law. No. 66,377. Frank Shepherd, Plaintiff, vs. United Phonograph Stores, Inc., Defendant. Bill of Exceptions. Filed Feb. 7, 1925. Morgan H. Beach, Clerk. Hamilton and Hamilton, Attorneys at Law, Washington, D. C.

Endorsed on cover: District of Columbia, Supreme Court. No. 4315. Fidelity and Deposit Company of Maryland, appellant. vs. Frank Shepherd. Court of Appeals, District of Columbia. Filed Mar. 31, 1925. Henry W. Hodges, clerk.

IN THE
Court of Appeals, District of Columbia

AUG 28 1925

APRIL TERM, 1925

No. 4315

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Appellant*,

vs.

FRANK SHEPHERD.

BRIEF OF APPELLANT

GEORGE E. HAMILTON,
JOHN J. HAMILTON,
GEORGE E. HAMILTON, JR.,
HENRY R. GOWER,
EDMUND BRADY,
WALTER A. JOHNSTON,
Attorneys for Appellant.

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Court of Appeals, District of Columbia

APRIL TERM, 1925

No. 4315

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Appellant*,

vs.

FRANK SHEPHERD.

BRIEF OF APPELLANT.

STATEMENT.

Plaintiff (appellee), on February 21, 1922, filed suit at law in the court below to recover \$4100.00 damages against the United Phonograph Stores, a Delaware corporation, doing business in the District of Columbia and elsewhere, for breach of contract.

The declaration was in two counts, the first setting up a special contract, and the second consisting of the common counts, accompanied by a bill of particulars.

The case was tried and submitted to the jury on the first count, the material allegations of which are as follows (Rec. p. 2): That on the 1st day of November, 1921, the defendant promised and agreed that if plaintiff would

pay into or cause the sum of \$5,000 to be paid into the business of the defendant, the defendant would open up a branch office in Los Angeles, California, and place the plaintiff as its agent in charge thereof, and allow the plaintiff a drawing account of \$350 per month for a period of two months from November 15, 1921, payable on the 1st and 15th of each month, chargeable against a stipulated commission of 15% on all sales of stock of the defendant corporation made by plaintiff, the defendant further promising and agreeing to pay the plaintiff's traveling expenses; that in accordance with this agreement, plaintiff on or about said date paid the sum of \$2,500 to the defendant in cash and immediately thereafter caused a like sum to be paid to the defendant on his behalf, making a total of \$5,000 agreed upon; that notwithstanding this agreement and promise on the part of defendant, defendant utterly failed, neglected and refused and still refuses to open a branch in Los Angeles or elsewhere in the State of California and place the plaintiff as its agent in charge thereof, and has failed and refused and still refuses to pay the plaintiff \$350 per month, or any part thereof, due him on the drawing account, and failed and refused and still refuses to pay a balance of \$175 due the plaintiff on account of traveling expenses; to the damage of the plaintiff in the sum of \$4,100.

The defendant subsequently pleaded the general issue.

On the same day (February 21, 1922) plaintiff sued out a writ of attachment before judgment against certain personal property of the defendant, which was executed and property of the appraised value of \$2,876.50 was seized.

The defendant, on February 27th, filed its undertaking in the cause, with the appellant, Fidelity and Deposit Company of Maryland, as surety, the body of the undertaking reading as follows: (Rec. p. 4):

"The defendant, and Fidelity and Deposit Company of Maryland, surety, in consideration of the discharge from the custody of the Marshal of the property seized by him, upon the attachment sued out against the defendant, on the 21st day of February, A.D., nineteen hundred and twenty-two, in the above-entitled cause, appear, and submitting to the jurisdiction of the Court, hereby undertake for themselves and each of them, their and each of their heirs, executors and administrators, successors or assigns, to abide by and perform the judgment of the Court in the premises, in relation to said property, which judgment may be rendered against all the parties whose names are hereto subscribed."

The goods seized were thereupon returned to the defendant, which, in May, 1922, was adjudicated a bankrupt by the District Court of the United States for the Southern District of New York.

One Hartridge was appointed first receiver and later trustee, and by ancillary proceedings duly had in the Supreme Court of the District of Columbia, on May 15, 1922, Hartridge was appointed receiver and later trustee of the entire assets of the defendant.

Later, the property seized under the attachment and returned to the defendant was sold by Hartridge under order of the New York Court and the Supreme Court of the District of Columbia (Rec. p. 50).

On October 18, 1922, the defendant filed a verified motion to stay the cause on the ground that the defendant had been adjudicated a bankrupt and that the action was founded upon a claim which a discharge in bankruptcy would release (Rec. p. 7).

On October 27, 1922, on motion of the plaintiff, Hart-

ridge, Trustee, was made a party defendant (Rec. p. 7), but on November 23, 1922, for "good cause shown" the substitution was set aside by the court.

One June 4, 1923, the court filed a memorandum (Rec. p. 8) overruling the motion to stay, stating (Rec. p. 9):

"that plaintiff should be permitted to proceed in the cause, and, if by verdict of the jury and judgment of the court entered thereon, it shall appear that plaintiff is entitled to recover, such judgment would be properly entered against both the defendant and the Fidelity and Deposit Company of Maryland, as surety on the undertaking aforesaid, with the right on the part of plaintiff to enforce the same against the surety, such judgment, however, to be perpetually stayed as against the bankrupt defendant.

"It results that the motion to stay should be and is overruled."

The order entered, however, simply stated "that said motion be and the same is hereby overruled" (Rec. p. 10).

Thereafter, in June 1924, the case came on for trial, the appellant, Fidelity and Deposit Company of Maryland, alone defending, and resulted in a verdict for the plaintiff for \$3,750.

After a motion for a new trial had been overruled, judgment was entered (Rec. p. 10), the material part of the same reading as follows:

"* * it is ordered this 13th day of December, 1924, that the judgment heretofore entered in this cause on December 8th, 1924, be, and the same is hereby vacated, and that in lieu thereof judgment be entered for the plaintiff against the defendant and said Fidelity and Deposit Company of Maryland for the sum of Three thousand seven hundred and fifty

dollars (\$3,750.00) with interest from February 21, 1922, and costs, that execution on said judgment against the defendant United Phonograph Stores, Incorporated, be, and the same is hereby perpetually stayed; that execution shall be had against said Fidelity and Deposit Company of Maryland and may be issued, but this judgment to be released and held for naught as to said Fidelity and Deposit Company of Maryland upon the delivery by it or, by the defendant to the U. S. Marshal of this District of the property levied upon, if said delivery be made within ten (10) days from the date of entry of this judgment, or, in lieu of such delivery, the payment by said Fidelity and Deposit Company of Maryland to the plaintiff of the sum of Two thousand eight hundred seventy-six and 50/100 dollars (\$2,876.50), the appraised value of the property attached herein, with interest from date hereof."

In support of the allegations of the declaration, the plaintiff (who, for the purposes of this appeal may be regarded as the only witness) testified that his "*connection with the defendant was under a written letter of contract*" (Rec. p. 14); that he expressed a desire for an agency for the defendant at Los Angeles, Calif., and after a conference with the President of the defendant, he stated that the Company would give him the position he applied for (Rec. p. 18); that he obtained a subscription of \$2,500 for stock in the defendant Company from one Mary M. McKenna, and that he personally subscribed \$2,500 and received therefor a certificate for 100 shares of the common stock of the defendant (Rec. pp. 47 and 20); that he had a definite understanding with Mr. Yeager, President, Mr. Morris, Vice President, and Mr. Cordish Fiscal Agent, of the defendant, that a California

Company was to be formed, and that his subscription was to that Company, and until such Company was formed, he should accept \$2,500 worth of stock in the Delaware corporation (defendant) as a temporary receipt for his subscription, which would later be converted into stock of the California Company, but this was never done; and further, that in consideration of his furnishing \$5,000—\$2,500 of his own and \$2,500 which he obtained from a friend, they (Yeager, Morris and Cordish) agreed to match his \$5,000 with a \$5,000, jointly between them, to start the California Company with a capital of \$10,000, but this was never done (Rec. p. 42); that later he received the contract he demanded before proceeding to California in a letter from Mr. Cordish dated November 14th (Rec. p. 18); the letter of November 14th was in response to one of his of November 11th (letters are set forth in full, pages 21 to 26 of Record); that he started from Washington for Los Angeles, Calif., November 15th, but on arrival there found he was unable to offer stock in the defendant or in a California corporation because it was necessary to first comply with the California Corporate Securities Act (See letters of plaintiff to Mr. Morris of November 27th, Rec. pp. 31 to 33, and to Mr. Cordish of November 28th, Rec. pp. 34-35). That because of the difficulties encountered, and which are set out in letter to Cordish of December 4, 1921 (Rec. p. 37), he left Los Angeles December 4th, and returned, at his own expense and suggestion, to New York for a conference with Cordish. From New York he came to Washington, and Mr. Morris, the Vice President, told him that it would be several months before they could get together and proceed with the California proposition. On January 10, 1922, he wrote Mr. Morris, asking, among other things, that he (Morris) immediately arrange to have is-

sued in his favor 50 shares of common stock promised by Mr. Cordish as a bonus on his original subscription of 100 shares of common stock (Rec. p. 43). Finally, on February 16, 1922, plaintiff wired to Yeager to cancel any arrangements requiring his services. (Rec. p. 47.)

Appellant, Fidelity and Deposit Company of Maryland, then offered in evidence duly certified copy of the bankruptcy proceedings in the District Court of the United States for the Southern District of New York in the matter of the bankruptcy of the defendant, as well as the proceedings in bankruptcy Cause No. 1307 in the Supreme Court of the District of Columbia in the matter of the bankruptcy of the defendant, which records, upon objection of the plaintiff, were excluded.

It was agreed in open court between counsel for the respective parties that the property in the District of Columbia of the defendant involved in said attachment was sold at the instance of the Trustee in Bankruptcy acting under the orders of the Supreme Court of the District of Columbia and the United States District Court for the Southern District of New York, but upon objection by counsel for the plaintiff this testimony was excluded (Rec. pp. 49, 50).

The appellant, Fidelity and Deposit Company of Maryland offered no further testimony, and judgment was rendered against the defendant and it as above set forth.

ASSIGNMENTS OF ERROR

1. The Court erred in admitting in evidence the questionnaire which plaintiff testified he had filled out at request of Morris, Vice President of defendant Company.

2. The Court erred in admitting in evidence letters pass-

ing between plaintiff and Nat Cordish, Incorporated, and Nat Cordish.

3. The Court erred in admitting in evidence certificate of stock issued by defendant to plaintiff.

4. The Court erred in admitting in evidence check for \$2,500.00 endorsed by plaintiff to Nat Cordish, Inc.

5. The Court erred in admitting in evidence testimony of plaintiff regarding agreement between plaintiff and Yeager, Morris and Cordish, that the latter would contribute to the capital of a California Company to be formed as well as any testimony relating to the formation of a California Company.

6. The Court erred in excluding from evidence testimony offered by the defendant surety to show the adjudication in bankruptcy of the United Phonograph Stores, within four months of the levying of the attachment of plaintiff of its property and the sale of the attached property by the Supreme Court of the District of Columbia in said bankruptcy proceedings.

7. The Court erred in refusing to stay the cause because of the bankruptcy of the United Phonograph Stores.

8. In overruling the motion of defendant surety to direct a verdict in favor of defendant and itself at the close of all the testimony.

9. The Court erred in refusing to grant the prayer offered by defendant.

ARGUMENT

Of the Assignments of Error it is not proposed to press numbers 1, 2, 3, 4, and 9 on this appeal.

Under the Eighth Assignment, that is, the refusal of the trial Court to direct a verdict in favor of the defendant and appellant at the close of all the testimony, two questions are raised:

First; the failure of the trial court to direct a verdict for the defendant on the ground of a variance between the allegations of the declaration and the proof; and:

Second, the failure of the trial Court to direct a verdict for the defendant and appellant on the ground that the attachment, having been levied within four months of the bankruptcy of the defendant, was under the provisions of the Bankruptcy Act, null and void.

FIRST

The first proposition is covered, as above stated, by the Eighth Assignment of Error, and also by the Fifth, the latter reading as follows:

“The Court erred in admitting in evidence testimony of plaintiff regarding agreement between plaintiff and Yeager, Morris and Cordish, that the latter would contribute to the capital of a California Company to be formed as well as any testimony relating to the formation of a California Company.”

Recurring to the first count of the declaration (Rec. p. 1) the plaintiff in substance charges that the defendant, a Delaware corporation, promised and agreed with him that if he paid or caused to be paid the sum of \$5,000 into its business, that it would open a branch office in Los Angeles, California, place him as its agent in charge thereof, allow him a certain drawing account, commission on sales of stock of the defendant company, and pay his travelling expenses; that he did pay in to the defendant the sum of \$2,500.00 in cash and caused a like sum to be paid to it on his behalf; but that the defendant refused to open the branch office, place plaintiff in charge thereof, and pay him the drawing account and a certain balance due on account of travelling expenses.

The declaration, it will be observed, is simple, direct and explicit in its terms; and, if true, sets forth a cause of action and the only course of action that the appellant surety company could be called upon to meet.

In view of the fact that the real defendant in the case, a non-resident of the District of Columbia, had become bankrupt more than three years prior to the trial of the action, the appellant was at a great disadvantage in the defense of the case, and it was therefore vital that the plaintiff be confined in his proof to the allegations of his declaration.

The testimony offered by the plaintiff relating to the contract set forth in his declaration was substantially as follows:

On page 14 of the Record he says, with reference to his contract with the defendant: "My connection was under a written letter of contract."

At page 18 of the Record he states: "I later received the contract from Mr. Cordish that I demanded before proceeding to California. It is * * * dated November 14th." The letter of November 14th referred to by plaintiff (Rec., p. 23) must be read in connection with a letter of the plaintiff to Mr. Cordish, dated November 11. (Rec., p. 21) These two letters in substance set out that plaintiff was to receive a commission of 15 per cent on all securities of the defendant sold by him; and, in the light of the subsequent testimony from the plaintiff, it is important to note that he was to sell securities of the defendant, a Delaware corporation, and not those of a California corporation to be formed as he later testified. The New York office of the defendant was to assume the expense of the Los Angeles office for two months and pay plaintiff's travelling expenses. He was authorized to open a bank account, lease an office, conduct the business of the

sale of the securities of the defendant, and was to receive a drawing account of \$350 per month for two months, beginning November 15, 1921, such account to be chargeable against commissions to be earned by him. The remainder of the letter is not, we think, important as bearing on the subject of the contract, dealing, as it does, principally with directions as to the method of doing business, and answering certain questions propounded by the plaintiff in his letter of November 11th.

The Court will note that there is nothing in these letters which the plaintiff stated constituted a contract with regard to the payment of \$5,000. There is a demand from the plaintiff in his letter of the 11th to Mr. Cordish for the repayment of \$250 on his subscription and a request for a letter from Cordish to the effect that he (Cordish) was holding stock certificate in plaintiff's favor for fifty shares of the common stock, representing his bonus on his subscription for a hundred shares. In Mr. Cordish's reply (Rec. p. 26) he states that check for \$250, representing your overpayment on your personal subscription was delivered to you in person * * at Washington, D. C."

This last is of importance in its bearing on the plaintiff's subsequent testimony that the issuance of stock in the defendant company to him was merely in the nature of a temporary receipt, and that in reality the money was intended as a subscription to a California corporation yet to be formed.

The foregoing seems to have been all of the written evidence of a contract between the parties, and it tended to support the allegations of the declaration with the exception of the reference to money to be paid in. There is no hint in the declaration of any other contract. It is submitted that by plaintiff's own written testimony it was clearly proven that the agreement was that he was to sub-

scribe or obtain subscriptions for \$5,000 worth of the stock of the defendant, a Delaware corporation; and it is important to note that it is nowhere in the record stated or pretended that the subscription of \$2,500 obtained by plaintiff from Mary McKenna was anything but a subscription to the stock in the Delaware corporation. With the record in this condition the absolute departure by the plaintiff from the allegations of his declaration and the evidence theretofore submitted by him is found at page 43 of the Record.

To understand this testimony the Court will note that the plaintiff testified that his first application to the Company for employment was made to Mr. Morris, its Vice-President, in Washington (Rec. p. 14); that after submitting references and filling out a questionnaire he accompanied Mr. Cordish to New York, where he met and had a conference with Mr. Yeager, the President of the company (Rec. p. 18). The witness thereafter was asked by his counsel as to what he meant by a statement in his letter of January 9, 1922, to Mr. Cordish (Rec. p. 41) as to "a definite understanding." He replied (Rec. p. 42):

"The definite understanding referred to by me in this letter was that during my entire negotiations with Mr. Yeager, Mr. Cordish and Mr. Morris, and also in my application that I was to locate in the West. *The three of them jointly assured me that a California Company was to be formed and I specifically joined their organization under that understanding, and my subscription of \$2,500.00 was made to that Company.*

"It was further provided that until this California Company was formed that I should accept \$2,500.00 worth of stock in the Delaware Corporation as a temporary receipt for my subscription which would later be converted into the stock of the California Company. This was never done.

"Q. Did they make any statement as to what they would furnish if you would deliver that?

"A. In consideration of my furnishing \$5,000—\$2,500 of my own and \$2,500 which I obtained from a friend, making \$5,000 in all—that *they agreed to match my \$5,000 with a \$5,000 jointly between them to start the California Company with a capital of \$10,000.*

"Q. Was that ever done?

"A. It was never done."

From the foregoing it will be seen that the plaintiff departed absolutely from the allegations of his declaration and the proof theretofore offered by him, so that instead of the agreement being one by the defendant corporation, in consideration of the payment of \$5,000 by plaintiff, that it would open a branch office in Los Angeles, California, and place plaintiff as its agent in charge thereof, etc., we find the agreement to have been one between Yeager, Cordish and Morris on the one side, and the plaintiff on the other, to form a California company; that plaintiff's subscription was to the California company and that his subscription to the Delaware corporation was merely a temporary receipt to be converted into stock of the California Company, which was to have a capital of \$10,000, \$5,000 to be contributed by the plaintiff and \$5,000 to be contributed jointly by Yeager, Morris and Cordish. The agreement to form a California Company was necessarily between the individuals, as the defendant corporation itself could not be a party to such an agreement.

It is therefore respectfully submitted that, based upon the foregoing testimony, all of which was offered by the plaintiff himself, there was a material variance between the allegations of the declaration and the proof, and that the Court

below was in error in failing to exclude the testimony last quoted, and further in failing to direct a verdict at the close of all the testimony, on the ground of variance.

“It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover, and the one must consist with the other.”

Hetzel v. R. R. Co., 7th D.C. Appeals, 524-529.

SECOND

The Sixth and Seventh Assignments of Error, which are also comprehended in the Eighth Assignment of Error, may be considered as one, and involve the question as to the effect of the bankruptcy of the defendant on the liability of the appellant surety company. Suit was filed and the attachment of the property of the defendant was levied February 21, 1922. The appraised value of the property levied on was \$2,876.50. Under Section 454 of the Code of the District of Columbia, in order to obtain a release of the property attached the defendant, with appellant surety company, as surety, gave an undertaking providing that “The defendant and its surety, in consideration of the *discharge by the Marshal of the property seized* by him * * * appear and submitting to the jurisdiction of the Court hereby undertake * * * to abide by and perform the judgment of the Court * * * *in relation to said property* which judgment may be rendered against all the parties whose names are hereto signed.”

Section 67 f of the Bankruptcy Act provides:

“That all * * * attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the

filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the * * * attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt * * * ”

On May 10, 1922, the petition in bankruptcy was filed in the United States District Court for the Southern District of New York and the defendant was duly adjudicated a bankrupt on May 29, 1922.

The petition was filed within less than three months after the attachment was levied and one Julian Hartridge was appointed receiver and afterwards elected trustee of the estate of said bankrupt. By ancillary proceedings in Bankruptcy No. 1307, on the dockets of the Supreme Court of the District of Columbia, the said Hartridge qualified in this jurisdiction and later, *under authority of the United States District Court for the Southern District of New York and of the Supreme Court of the District of Columbia sold the property* which had been the subject of the attachment. (Rec., p. 50.)

Proof was also offered to show that the attachment was void under the provisions of Section 67 f, above quoted.

These offers were refused by the Court and it is respectfully submitted that this was error.

In this case we are dealing with a forthcoming undertaking by which the defendant and its surety agree to perform the judgment of the Court *in relation to the property*.

At the outset it must be conceded that had no undertaking been given the attached property would have remained in the hands of the Marshal and upon the qualification of the Receiver and Trustee it would have passed

to the latter to be sold for the benefit of the estate, the attachment being absolutely void under the terms of Section 67 f of the Act.

There is a clear distinction between the cases where the attachment has been levied more than four months prior to the filing of the petition in bankruptcy, and those where the attachment has been levied within the four months period.

In the former it may be fairly said that a bond given by the defendant in the attachment proceeding, to secure a release of the property attached, stands in lieu thereof. And, as the statutes in many jurisdictions relating to judgments in attachment proceedings allow a judgment for the sale of the attached property, it has been held in these jurisdictions, where such property has been released by the giving of a bond by the defendant, that a special judgment may be taken against him in the attachment proceedings in order to fix the liability of the sureties on the bond; and in this manner the obligation of the sureties may be enforced without reference to the discharge in bankruptcy of the principal. This is substantially the doctrine announced in *Hill v. Harding*, 107 U. S. 631, 130 U. S. 699. Where, however, the attachment proceedings are not commenced more than four months prior to the bankruptcy proceedings against the debtor, no valid lien is obtained, and the rule sustaining the liability of the surety on the theory that the bond stands in lieu of the property attached no longer obtains; and the doctrine that the discharge of the debtor or principal will prevent the happening of the contingency upon which the liability of the surety depends, and therefore operate to release him, will apply.

In *Crook-Horner Co. v. Gilpin*, 112 Md. 1, the action was one like the present, begun by attachment against

the defendant, a nonresident of the State. The defendant appeared and filed a bond to relieve the attachment. Within four months thereafter the defendant became bankrupt and pled that fact. To the plea of discharge in bankruptcy the plaintiff replied that the adjudication of the defendant and his subsequent discharge did not release or discharge the surety on the bond; that the judgment sought to be obtained against the defendant was solely and exclusively to bind the surety and the bond, and if a judgment should be had against the defendant the Court would be asked to restrain the plaintiff from ever issuing an execution on the judgment against the defendant. The defendant demurred to this replication. At page 5 the Court said:

“The ultimate inquiry then in the case at bar and wherein it differs from *Kendrick and Roberts v. Warren Bros.* case, *supra*, properly comes to this: Can the Courts of this State enter a judgment, with a perpetual stay of execution, against a defendant in an attachment suit instituted within four months before the defendant has filed a petition to be adjudicated a bankrupt and when he is subsequently discharged as a bankrupt, for the purpose of allowing the plaintiff to proceed against the surety on the bond given to dissolve the attachment?

“The decision of this question, as we have said, must depend upon the language and the effect to be given to Section 67 f of the Bankruptcy Act, herein cited. The language of this section, we think, is quite clear and comprehensive, and broad enough to include within its terms the defendant and the surety we are here dealing with. It provides in terms that all levies, judgments, attachments, or other liens obtained against a person who is insolvent, at any time within four

months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt."

The Court then, after reviewing numerous authorities, held that there could be no judgment against the bankrupt with a perpetual stay and therefore no judgment against the surety.

In *Wise Coal Company v. Columbia Zinc & Lead Co.* (Mo. Court of Appeals, 1911), 27 A. B. R. 445, at page 447, the Court states the question before it:

"The bankruptcy proceedings were begun within four months after the levy of the attachment writ and the important questions in this case are: Did the bankruptcy proceedings annul the attachment and destroy its lien, *and if so, did the annulment release the surety on the forthcoming bond.*"

After referring to certain authorities cited by the plaintiff, the Court says, at page 450:

"In these cases it was held, and rightly so, that the bankruptcy of the principal and his discharge did not release the sureties, and this because the sureties had, by the terms of their bond, become sureties for the debt, and by the express provisions of the Bankruptcy Act, sureties for a bankrupt's debt are not released by the discharge of the bankrupt. In this case, however, no such obligation was assumed by the surety on the forthcoming bond. It did not agree to pay any judgment that might be secured. When the forthcoming bond was given the property was in the hands of the sheriff, under the attachments, and was, therefore, in custodia legis, and subject to the order of the Court. When this bond was given the possession of the

property was, by the sheriff, delivered to the attachment debtor and the obligation of the surety upon the bond was that the property should be forthcoming when the Court should so order. The property remaining in custodia legis, the lien of the attachment remained and the attachment debtor while holding possession of the property was merely a bailee of the sheriff, and the property remained subject to the Court's order. * * * Had no forthcoming bond been given, and the property remained in the hands of the sheriff it is clear that the bankruptcy proceedings would have resulted in the annulment of the attachment, and the sale of the property for the benefit of the estate of the bankrupt would have released the property, and at the same time destroyed the State Court's control over it in his case. The Court would, in that case, have no power to make an order upon the sheriff to produce the property or sell it to satisfy the judgment. As we have seen the attachment debtor and his surety on the forthcoming bond were mere bailees for the sheriff, and by the terms of their bond they were only bound to produce the property when the Court should so order, and when the attachment was annulled and the authority of the Court to order and require the production of the property was destroyed, the forthcoming bond was also destroyed, and the liability of the surety thereon destroyed."

In *Windlich-Muhlhauser Brewing Co. v. Simms*, 129 La. 134, the Court said:

"Section 16 of the Bankruptcy Act of 1898 merely recognizes this general rule of law. Section 67 f of the same statute, however, strikes with nullity all levies, attachments or liens obtained through legal pro-

ceedings against an insolvent at any time within four months prior to the filing of a petition in bankruptcy in case he is adjudged a bankrupt. It is difficult to conceive how attachment proceedings thus pronounced null and void can produce any legal effect. The attachment being dissolved by operation of the statute, nothing is left but a suit in personam, which is stayed by the pendency of the bankruptcy proceedings. In such a case the subsequent discharge of the debtor extinguishes the obligation on which the suit was based, and renders it legally impossible for the creditor to recover judgment against his former debtor. Where an attachment is released on bond, the condition is that the defendant will satisfy such judgment, to the value of the property attached, as may be rendered against him in the pending suit. C.P. Art. 259."

A similar result has been reached in reference to a bond given to discharge a garnishment in an action against the bankrupt upon a claim provable in bankruptcy at the time of his discharge, commenced within the four months period and pending at the time of the discharge.

In such case the surety is relieved, not because of the discharge of the bankrupt, but because the lien acquired by the garnishment is avoided by the bankruptcy proceedings, which destroyed the remedy by which a judgment can be recovered against the bankrupt.

Klipstein v. Allen Miles Co. (C.C.A.), 136 Fed. 385.

See also National Surety Co. v. Medlock, (C.A.Ga.) 19 A.B.R. 654.

In this case we have an additional element which does not enter into any of the other cases, and that is that the identical property attached and afterwards released to the

defendant and which the appellant surety company was by the terms of the judgment required to produce before the Court was by the order of the Supreme Court of the District of Columbia itself sold by the Trustee in Bankruptcy, thereby making its production and delivery to the plaintiff impossible.

It is therefore respectfully submitted that the Court below was in error in its rulings on the foregoing proposition and that the judgment should be reversed.

Respectfully submitted.

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Court of Appeals

DISTRICT OF COLUMBIA

April Term, 1925

No. 4315

**FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, Appellant,**

FRANK SHEPHERD.

APPELLEE'S BRIEF.

**J. MORRILL CHAMBERLIN,
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COURT OF APPEALS, DISTRICT OF
COLUMBIA

APRIL TERM, 1925

No. 4315.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, *Appellant*.

vs.

FRANK SHEPHERD.

APPELLEE'S BRIEF.

On or about November 1, 1921, United Phonograph Stores, a corporation engaged in operating a chain of stores in many cities (R., 25), for the sale of phonographs and records, agreed with appellee, Frank Shepherd, plaintiff below, that, if he would pay \$5,000 or cause that amount to be paid to the Company, a branch store would be opened in Los Angeles, California, of which he would be placed in charge. Mr. Shepherd was also to be allowed his expenses and a drawing account against which commissions on all sales of the company's stock made by him were to be charged.

After interviews with executives of the company, including the president, vice-president and fiscal agent, he was requested to fill out a questionnaire, furnish references and these being approved, he

delivered \$5,000 in cash to the company, for which \$2,500 in stock of the company was delivered to him for \$2,500 in cash paid by him personally and \$2,500 in stock was issued to one Mary M. McKenna, for the same amount of stock sold to her.

Preparatory to his departure for Los Angeles, he was assigned to the local office of the company to receive instructions (R., 18) and after considerable correspondence (R., pp. 9 to 26) he left on November 15, 1921, for that city, where he opened an office and prepared for business. Soon after his arrival, however, he ascertained that the California law prohibited the sale of the stock of a foreign corporation unless certain statutory requirements were met (R., 28). Mr. Shepherd informed the home office of this predicament (R. 28), forwarded copies of the California Corporate Securities Act (R., 30) and suggested a remedy by incorporating in California (R., 31, 32, 33), but, after repeated efforts (R., 34 to 37) to have the home office take that action or otherwise comply with the California law, and being unable to proceed, he left California December 4, 1921 (R., 38). Upon his returning to Washington he explained his position to the same officers of the company he had previously interviewed, but they seemed disinclined to comply with the California Securities Act and after waiting some time for them to do so (R., 39), in which time they made other propositions to him (R., 39, 44), which did not interest him, he demanded the retirement of the stock for which he had subscribed and the return of his money (R., 41, 43). Finally severing his connection with the company, February 16, 1922, he brought suit for the \$2,500 he had paid in, and also for the agreed com-

mission for his sale of the stock to Mrs. McKenna and his drawing account and for reimbursement for traveling expenses (R. 1).

The defendant pleaded the general issue and accompanied the plea with an affidavit of its president, Yeager, denying that the company had ever employed the plaintiff, and stating that all negotiations had been made with Cordish, the company's fiscal agent (R., 5).

When the case was tried, neither Yeager, Cordish, or Morris, appeared as witnesses, nor was any other witness called to testify for the United Phonograph Stores and no defense was made other than by the Surety Company, the sole appellant here, which company had signed the undertaking releasing the property of the defendant that plaintiff had caused to be attached before judgment.

As stated in appellant's brief the defendant, United Phonograph Stores, Inc., was adjudicated a bankrupt within four months after the attachment was levied.

Whether the adjudication in bankruptcy avoided the undertaking discharging the attachment would seem to be the only question in the case, but appellant assigned nine errors, five of which have been abandoned, saving only the law question first stated and the further technical defense of variance. As stated, no witness testified for the defense and the testimony given on behalf of the plaintiff was solely relied upon by the surety to avoid liability.

Variance

Appellant urged at the trial and contends here

that the proof did not support the allegations in the declaration and that plaintiff's contract was different from the one proved. Fragmentary portions of the evidence are gathered by appellant from which it insists that the real contract was that plaintiff agreed to put \$5,000 cash in a California Corporation to be organized individually by Yeager, Cordish, Morris and himself with a capital of \$10,000, of which those officials were to contribute \$5,000 (Brief, 13).

Again, appellant contends that the contract in the case was to be found in the Cordish letter to plaintiff of November 14, which appellant says must be used in connection with plaintiff's letter to Cordish of November 11, and that there was nothing in these letters with regard to the payment of \$5,000 (Brief, 11).

Again, appellant contends that it is nowhere in the record stated or pretended that the subscription of \$2,500 obtained by plaintiff from Mrs. McKenna was anything but a subscription to the stock of the Delaware Corporation (Brief, 12), although in the only prayer offered by appellant, the court was requested to charge that the \$375 commission earned by plaintiff for that sale should be charged against his drawing account (R., 51).

The following question seems pertinent: If the McKenna subscription was not for the purpose of raising the \$5,000 in the contribution required of plaintiff, what was it for? His claim for commission on the McKenna sale was acknowledged by the Company (Rec., 40).

Some play is also made by appellant concerning the \$250 overpayment by plaintiff on his subscription (Brief, 11) as confirming an intention to sub-

scribe only to a California Corporation, although plaintiff's check to Cordish for \$2,500 for which he received a certificate for 100 shares of stock, was introduced in evidence over appellant's objection (R., 21), plaintiff having already left his check for \$250 with Cordish on account of the same subscription, which was later returned to him by Cordish.

Naturally the court below would not permit pieces of evidence to be taken in this way and left the jury to consider all of the evidence.

Appellants' wail at being at great disadvantage in the defense of the case, as stated on page 10 of its brief, seems deserving of scarce consideration in view of the failure to call Yeager, Morris or Cordish as witnesses or else account for the failure to produce them at the trial.

We do not deem it necessary to assemble the various and numerous portions of the evidence to match those in support of the contention of variance raised by the surety. The record is replete with evidence confirming the fact that Mr. Shepherd was engaged as the representative of the United Phonograph Stores when he left for California.

The witness Finney confirms this (R., 49), and the documentary evidence sustains the fact, yet the surety seeks to construe the testimony of appellee to show that he made an entirely different contract, not only different from the one sued upon, but also one that he, himself, failed to carry out.

We do not dispute appellant's statement on page 14 of its brief, that the law requires that the pleadings and proof must be consistent, but deny application of that principle to the case at bar, but we cannot refrain from observing that the law quoted is

selected from one of the few cases in which the eminent Chief Justice Alvey, late of this Court, was reversed by the Supreme Court, his finding that a variance existed being not sustained. *Hetzel vs. B. & O. R. R.*, 7 App. D. C., 524, reversed, 169 U. S. 26.

Under authority of *Barry vs. Foyles*, 1 Pet. 311, and *National Surety Co. vs. Poates*, 43 App. D. C. 334, it may seriously be doubted if appellant has the right to raise the question of variance. The failure of the Phonograph Stores to defend amounted to a confession of judgment and as said in the *Poates* case, quoting Mr. Justice Van Orsdel, in the *U. S. Security Co. vs. American Fruit Product Co.*, 40 App. D. C. 239, the surety's only relation to the original suit was through its contract to abide by and perform the judgment that should be rendered against defendant."

As to right of surety to attack where attachment was discharged, see comprehensive note, 32 L.R.A. (N.S.) 401.

The Attachment Was Not Avoided by the Adjudication in Bankruptcy.

This point of law was naturally the same that was raised by the motion of the surety company to stay the proceedings, which motion was overruled in a memorandum opinion by Mr. Justice Hoehling (R. 8).

Collier, in the latest edition of his work on Bankruptcy, Vol. 1, page 587 (13th Ed.), in discussing Sec. 16 of the Act, under the heading "Attachment Bonds" says:

“A discharge in bankruptcy of the party principally liable does not preclude a creditor, whose attachment or garnishment had been levied more than four months before bankruptcy proceedings, from entering a judgment against the bankrupt with perpetual stay of execution in order to charge the sureties on the bond.

In case of bonds given within the four months' period, there is a difference of opinion. Some courts hold that the bond is a substitute for the lien of the attachment and the adjudication of the principal has no effect on the liability of the surety, notwithstanding that the lien of the attachment is destroyed by virtue of Sec. 67 and that the creditor is entitled to a special judgment against the bankrupt, execution not to be issued thereon as a basis of future action against the surety.

Citing: *McCombs vs. Allen*, 18 Hun. 190; affirmed 82 N. Y. 114; *King vs. Block AM. Co.*, 126 App. Div. 48, 20 AM. B. R. 784; affirmed 193 N. Y. 608; *In re MAGGET (D. C. N. Y.)* 173 Fed. 232, *SCHUNACK vs. ART NOVELTY CO.*, 84 Conn. 331;

See also *VAN ZANT JACOBS CO. vs. STEIBER*, 90 Conn. 507.

The author then goes on to say:

“There is authority however for the contrary proposition that an attachment bond given within the 4 months' period is dependent upon the lien of the attachment and as that becomes void by virtue of the adjudication, the bond falls with it.”

The cases cited by appellant are those cited by the author in support of his last statement.

We believe the prevailing rule and the logic supporting the stronger authority, is to the effect that the surety in such cases is not relieved, because the undertaking is a new and independent contractual obligation that is in no way affected by the discharge of the principal. The provisions in the act against liens and preferences are for the benefit of the bankrupt's estate and the protection of other creditors and if relief to the surety were permitted the estate must suffer because the plaintiff would then take steps to share in the estate with other creditors and consequently the assets would be diminished instead of being increased by the attachment.

Late cases sustain this view, namely:

In Marks vs. Outlet Clothing Co. (Me. 1923) 4 AM. B. R. (N. S.) 270; 120 Atl. 427, the court in passing on the precise question, used the following words:

“The bankruptcy proceedings had no effect whatever upon the attachment, because that had already been vacated by the giving of the bond. There was no attachment upon which the proceedings could operate. Had no bond been given the attachment would have been dissolved by the bankruptcy, but another state of facts existed. The defendant in the suit instead of availing himself of bankruptcy proceedings at the time, saw fit to vacate the attachment in another way, and executed a bond to supersede it. His sureties signed with him and their legal obligations were thereby fixed by the terms of the bond itself. They bound themselves absolutely and unqualifiedly to pay the judgment. ‘So says the bond.’ There is no exception in the case

of bankruptcy. None is implied and the court can assert none. It can only enforce the contract made by the parties." Citing:

Guaranty Surety Corporation vs. Oppenheimer (Mass. 1923) 49 AM. B. R. 596, 137 N. E. 644, where the same question was considered. The court there said:

"The possibility of bankruptcy was in the minds of the parties. * * * If it had been their intention to qualify the liability of the sureties in case bankruptcy of the principal should occur within 4 months of its date, apt language to that effect should have been inserted in the bond. The attachment was dissolved by giving the bond. The lien acquired by the attachment was gone when the bond was delivered. The bond was not given for the property, nor as security for its value. It was a new obligation not liable to be discharged by the death or insolvency of the debtor. * * * While an attachment made within 4 months theretofore is dissolved by the bankruptcy of the debtor, *there is no similar provision with respect to sureties upon bonds given to dissolve an attachment.* Bankruptcy of the principal debtor does not affect rights required prior thereto by a creditor against third persons. Sec. 67f refers only to judgments which create a lien. It has no relation to a judgment sued as here is involved, citing METCALF vs. BARKER, 187 U. S. 165, 174.

The recent case of Brown vs. Four-in-One Coal Co., 286 Fed. 512, in which certiorari was denied by the Supreme Court, 262 U. S. 749, might be considered as conclusive authority.

In *Tormey vs. Miller*, 31 Cal. App. 469, 160 Pac. 858, the Court says: "The courts have uniformly given immunity to the defendant but such adjudication cannot operate to destroy the rights of the plaintiff under the undertaking given to release the attachment, or in other words, will not itself relieve the sureties on the undertaking of their obligations thereunder."

That case is especially well considered and contains lengthy extracts from favorable authorities.

The question was later treated by the California Court with positiveness, saying the point had been raised and squarely decided in two cases in that state. The appeal was by sureties on a bond given to release an attachment. Within four months after the commencement of the suit, defendant was adjudicated a bankrupt and the defendants contended they were thereby exonerated from their obligation on the bond by Section 67f of the National Bankruptcy Act. The decision in *Rosenthal vs. Perkins*, 123 Cal. 240, is as follows:

"It is clear that at the time the proceeding in bankruptcy was instituted there was no attachment in force—if the attachment lien has already been discharged by a bond for that purpose, then the liability of the sureties on the bond is not affected by the subsequent bankruptcy of the principal."

Fidelity and Bond Company vs. Bank (Texas), 149 S. W. 779, is directly in point: The Court there said that the creditors interest could not be served by the bankruptcy Court in any way interfering in this proceeding and in fact the creditors would suffer if the Security Company is relieved of its obli-

gation, because the plaintiff would then take steps to share in the estate of the bankrupt with other creditors. As a result, the attachment proceedings in this case has been to increase rather than diminish the assets of the debtors estate, there is serious doubt that the provisions of the bankrupt law, as to attaching liens, have any application to the attachment process in this case.

St. Louis Co. vs. St. Tonis Co., 108 Mo. App. 479, 83 S. W. 781, is to the same effect.

In Tapley vs. Goodsell, 122 Mass. 176, 182, the Court said:

“But a surety on a bond to dissolve an attachment does not stand upon the footing of a stranger to the action. The very purpose as well as the tenor, of his obligation is to secure the payment of any judgment that may be recovered against his principal. The bond is not affected by contingencies which might have discharged the attachment, if no bond had been given. Neither death nor bankruptcy of the principal discharges the surety from his obligation to satisfy a judgment lawfully rendered against the principal or his representatives, but such judgment in the absence of fraud or collusion is conclusive against the surety.”

The idea of the undertaking was to prevent a circuitry of action by making the surety a party to the pending suit and the rendition of judgment against it (Tenney vs. Taylor, 1 App. D. C. 229) and “A statute which preserves a surety’s liability notwithstanding the discharge of the principal, but which at the same time forbids the taking of a step essential to enforce the liability against the surety, would be a mockery.”

Rosenthal vs. Nove, 175 Mass. 563, concludes with the words:

“In our opinion it was not the intention of Congress unnecessarily to interfere in any way with the remedies of the creditor against the persons responsible to him than the bankrupt himself.”

And the opinion in U. S. Wind Engine & Pump Company, 227 Pa. 262, considering the question of preventing a special judgment against the bankrupt recites:

“The appellee has secured its discharge and its personal liabilities are gone, but that does not constitute any reason why a judgment against it should not be entered for the special purpose of fixing and enforcing the liability of the surety. The surety took the risk of the appellee’s insolvency, a risk that appellant was supposedly protected against by the very bond in question. So it would be most unfair to allow the substitution of the bond for the goods attached, and then deny the formal relief necessary in order to enforce its terms against the surety.”

The precise question is answered in King vs. Block Amusement Company, 111 N. Y. Supl. 102, affirmed, 193 N. Y. 608, holding that an adjudication in bankruptcy did not avoid an undertaking to discharge an attachment, which had been issued within four months of the filing of the petition in bankruptcy.

Collier, at page 1594 (13th Ed., Sec. 67) under the heading “Effect on Attachment Bond” says:

“While this sub-section (67f) discharges the lien of the attachment, it does not vacate the writ. If the bond is one which in legal contemplation takes the place of the attachment lien, and gives the person in whose favor the bond is executed the right to recover on the bond without affecting the property, the annulment of the lien of the attachment does not destroy the bond. But if the bond is substituted for the property attached, the destruction of the attachment necessarily annuls liability on the bond.”

Numerous authorities are cited and *Crook-Horner Co. vs. Gilpin*, 112 Md. 1, relied upon by appellant, contra.

While the precise question does not appear to have been passed upon by this honorable court, the character of a similar bond was fully studied and pronounced “a contract” by Mr. Justice Van Orsdel in the comparatively recent case of *U. S. Surety Co. vs. American Fruit Co.*, 40 App. 239, in which the same eminent counsel who now seek to disturb this verdict and judgment, appeared for the appellee.

This court in that case construed the wording of an identical bond and held it to be a contract taking the place of the property and by its terms providing that if the property attached be delivered to the defendant upon his executing an undertaking under Sec. 455 of the Code and judgment in the action shall be rendered in favor of the plaintiff, “*it shall be a joint judgment against both the defendant and his surety.*”

The Court, speaking through Mr. Justice Van Orsdel, said:

“An attachment or appeal bond is a contract. Where the surety, by express agreement in the bond, as in this case, agrees to submit to the jurisdiction of the court, and abide by and perform the judgment of the court, it is equivalent to a waiver of process and submission to the jurisdiction of the court. Where the statute provides for summary entry of judgment against the surety, and, by the terms of the bond, he has submitted himself to the jurisdiction of the court for that purpose, no fact remains to be ascertained to render the surety liable, and a separate action on the bond is unnecessary. * * * A party who enters his name as surety on an appeal bond does it with full knowledge of the responsibility incurred. In view of the law relating to the subject it is equivalent to a consent that the judgment shall be entered up against him if the appellant fails to sustain his appeal. * * * If this is the law as to appeal bonds, it is not apparent why the Congress may not extend similar jurisdiction over sureties upon attachment bonds.”

The Supreme Court in dismissing a writ of error in that case, speaking through Mr. Justice Holmes, used these words:

“That a man may contract to be bound by a judgment in which he has no right to be heard, and that a statute may authorize him to make himself a party to such judgment, was decided, if it needed a decision, in *Beall vs. New Mexico*, 16 WALL. 535.”

It is respectfully submitted that the judgment of the lower court should be affirmed.

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